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SHOW PROCEEDINGS AND ORDERS DATE: [03/03/88]

CASE NBR: [86107002] [CSV] CASE STATUS: [ ]
SHORT TITLE: [Brecheen, Robert A.]
VERSUS [Oklahoma] DATE DOCKETED: [06/18/87]

PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Apr 22 1987		Application for extension of time to file petition and order granting same until June 1, 1987 (White, April 23, 1987).
Jun 1 1987		Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jul 2 1987		Brief of respondent Oklahoma in opposition filed.
Jul 9 1987		DISTRIBUTED. September 28, 1987
Jul 29 1987		Reply brief of petitioner Robert A. Brecheen filed.
Nov 2 1987		Supplemental brief of petitioner Robert A. Brecheen filed.
Jan 13 1988		Supplemental brief of petitioner Robert A. Brecheen (Second Supplement) filed.
Feb 22 1988		REDISTRIBUTED. February 26, 1988
Feb 29 1988		The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)

PETITION FOR WRIT OF CERTIORARI

NO. 86-7002

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1987

ROBERT ALLEN BRECHEEN,

Petitioner

vs.

STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF APPEALS

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NO. 86-7002

IN THE SUPREME COURT OF THE UNITED STATES

Spring Term, 1987

Robert A. Brecheen,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

The petitioner, Robert A. Brecheen, an indigent person, asks leave of this Court to file the accompanying Petition for a Writ of Certiorari to the Supreme Court of the United States without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court.

The petitioner's affidavit in support of this motion is attached hereto. Petitioner proceeded in forma pauperis in the state trial and appellate courts below.

Respectfully submitted,

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Attorneys for Petitioner
Robert A. Brecheen

NO. 86-7002

IN THE SUPREME COURT OF THE UNITED STATES

Spring Term, 1987

ROBERT A. BRECHEEN,

Petitioner,

vs.

STATE OF OKLAHOMA

Respondent.

AFFIDAVIT OF POVERTY

I, ROBERT A. BRECHEEN, declare that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor, and that I believe that I am entitled to relief.

1. Are you employed? Yes ___ No X

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer. [redacted]

   b. If the answer is "no," state the date of last employment, and the amount of salary and wages per month which you received. [redacted]

2. Have you received within the last twelve months any money from the following sources?

   a. Business, profession or form of self-employment? Yes ___ No X
   b. Rent payments, interest, or dividends? Yes ___ No X
   c. Pensions, annuities, or life insurance payments? Yes ___ No X
   d. Gifts or inheritances? Yes ___ No X
   e. Any other sources? Yes ___ No X

3. Do you own any cash, or do you have any money in any checking or savings account?

Yes ____ No X (Include any funds in prison account)

If the answer is "yes," state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ____ No X

If the answer is "yes," describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute to their support. None

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

Robert Brecheen
ROBERT A. BRECHEEN

Sworn to and subscribed before me this the 7 day of May, 1987.

Notary Public

My Commission expires:

QUESTION PRESENTED

1. Is the defendant in a homicide case in which the State seeks the death penalty entitled to a change of venue under the Sixth and Fourteenth Amendments based on a presumption that, given the setting of the case, which included extensive pretrial publicity, a substantial number of potential jurors with fixed opinions and a well known and popular victim, there was a well grounded fear concerning his right to a trial by an impartial jury was violated; or must he demonstrate by clear and convincing evidence that a fair trial is a virtual impossibility, as required by the court below.

2. In a homicide case where the death penalty is sought, do improper appeals by the prosecutor to the passion and prejudices of the juror necessarily constitute fundamental constitutional error in the sentencing phase.

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NO. 86 -

IN THE SUPREME COURT
OF THE UNITED STATES

ROBERT ALLEN BRECHEEN,

Petitioner

vs.

STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE OKLAHOMA COURT OF APPEALS

Petitioner Robert Brecheen respectfully prays that a writ of certiorari issue to review the judgment of the Oklahoma Court of Appeals entered on January 20, 1987 affirming his conviction for murder and the penalty of death.

OPINIONS BELOW

The opinion of the Oklahoma Court of Appeals affirming petitioner's conviction and death sentence was rendered on January 27, 1983. The decision is attached in the Appendix. (App. A.) On March 2, 1987 the Oklahoma Court of Appeals denied a petition for reconsideration. The decision is included in the Appendix. (App. B)

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). The final judgment of the Oklahoma Court of Appeals was filed on March 2, 1987. The Honorable Byron White, pursuant to Supreme Court Rule 20.1, entered an order extending the time for the filing of the petition to and including June 1, 1987.

This petition was filed by deposit in the United States mail on or before June 1, 1987 by a member of the bar of this court and the appropriate affidavit sent to the Clerk of this Court pursuant to Supreme Court Rule 28.2.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth, Seventh, Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On March 27, 1983, Marie Stubbs, wife of Hilton Stubbs, a prominent merchant in Ardmore Oklahoma, was shot and killed in her home. Petitioner was tried in Ardmore, Carter County, Oklahoma, and convicted of Burglary and Homicide. Petitioner, who had no prior criminal record, was sentenced to death.

A. TRIAL PROCEEDINGS APPLICABLE TO THIS PETITION

1. Motion for Change of Venue

Petitioner was tried in Ardmore Oklahoma. According to the U.S. Census of 1980, Ardmore has a population of 25,000. Ardmore is in Carter County, which has a population of 40,000.

Almost immediately after the homicide, newspaper and television coverage both in the local paper and television as well as the Oklahoma City daily paper began to focus not only on the slaying but also on petitioner's arrest.

Petitioner's attorney immediately moved for a change of venue. The petition was accompanied by six affidavits, as required under Oklahoma procedure, of individuals from the community who set forth their opinion that due to publicity and other factors they had a preconceived opinion as to guilt. Petitioner's motion was also accompanied by six newspaper articles, most of them front page items, detailing the slaying. (Trial Transcript "Tr." 4-8; relevant portions of the transcript are contained in the Appendix as "App. C".)

One of the articles contained a picture of Mr. Brecheen identifying him as having been shot by the victim's husband. (Tr. 5.) Another article ran a picture of a police officer

examining the back of a pickup truck which contained a rifle. The caption for the picture read "The rifle was found in a pool of blood in the back of the pickup where the alleged assailant was found shot once by the victim's husband." (Tr. 5.) A follow-up story the next day again identified Brecheen as having been shot by the victim's husband. All of the remaining articles identified Brecheen as having been found in a wounded condition where he lay after being shot by the victim's husband.

The trial court, in reviewing the petition for a change of venue stated he was "concerned" about the questions raised by the motion (Tr. 10.) However, since the potential jurors were already waiting to be examined, the Court decided to rule on the motion after conducting voir dire.

2. Voir Dire

Voir Dire of each juror was conducted in front of the entire panel. From the start voir dire revealed that the potential jurors had been inundated with publicity which created a serious risk they could not be impartial. Almost all of the potential jurors examined had heard of the incident through press coverage. In addition, many knew the victim, or members of the victim's family, and almost all jurors had shopped in the family store. None of the potential jurors knew petitioner or members of his family.

The questioning of the first panel of twelve revealed the defects in trying the case in Ardmore. Of the first potential jurors presented for examination three of the twelve knew the victim or family members and ten out of twelve had traded at the family store. Questions of the first panel about press coverage and jurors' preconceived opinions concerning guilt revealed a high percentage of preformed opinions. The first juror examined on this issue in front of the entire panel of fifty potential jurors admitted he had formed an opinion as to guilt. He was immediately excused. (Tr. 32.) The defense immediately moved

for a mistrial since this whole incident was made in front of the entire panel. The motion was denied.

The next two jurors examined on this issue admitted to having formed an opinion at the time they read the press coverage, and were excused. (Tr. 35, 36, 37.) The same was true for two of the next three potential jurors. (Tr. 39, 41).

By this time there was a clear pattern developing that virtually all potential jurors had been exposed to media coverage and were acquainted with the victim, family members or the victim's store. Of the first six potential jurors examined, five out of six indicated in front of the entire panel that they did not feel they could lay aside their preconceived opinions. All were excused. Thereafter, the number of potential jurors who admitted such preconceived views drastically declined.

The following is a sample of the testimony the ultimate jurors gave during voir dire which bears on the chances for an impartial jury:

Juror McGuire: Had known Mr. Stubbs since 1960 and was acquainted with the victim. She was a customer at the Stubb's store. She had read about the case. She knew police officers who were to testify. (Tr. 148-160.)

Juror Raney: Knew the victim's daughter. She had heard about the case. (Tr. 37-39, 112-113).

Juror Hudson: Knew Mr. Stubbs and was one of his customers. She had read about the case and knew two officers who would testify. (Tr. 27, 43, 55, 56, 116).

Juror White: Knew Mr. Stubbs from shopping at his store. She had read about the case. (Tr. 29, 30, 45, 106-107).

Foreman Hoffling: Knew about the case and had formed an opinion as to petitioner's guilt. He still held this opinion at the time of trial but said he could set it aside. (Tr. 190-95).

Juror Jobe: Ms. Jobe had read about the case and been a customer in the Stubb's store. She knew the prosecuting attorney. (Tr. 210-216.)

Juror Winchester: Had been a customer of the store and read about the case. She knew one of the officers involved. (Tr. 27, 43, 54-55, 116-117).

Juror Mullinex: Her family had been customers of the store. She had read about the case. She knew the district attorney. (Tr. 120-127). During a special post trial proceeding relating to a charge of juror misconduct, she testified she casually knew the victim's daughter and that "everyone in town knows the Stubbs." (Supp T. 10).

Juror Murphy: Had read about the case and been a customer of the Stubbs. (Tr. 25, 39, 113).

Juror Nichol: Had been a customer of the Stubbs and had read about the case. (Tr. 157-62).

Juror Heller: Had heard about the case and knew the prosecuting attorney (Tr. 184-190).

Thus, the actual jury contained one person who knew the victim, one who knew the victim's daughter and three who knew the victim's husband. All but one of the jurors were customers at the family store. Not one juror could claim they had not heard of the case through the pretrial publicity. Three jurors knew the prosecuting attorney and three knew officers who would testify. No jurors knew Brecheen or his family.

Most importantly, one juror had formed an opinion as to Mr. Brecheen's guilt and claimed he could set it aside. This juror was ultimately selected as foreman of the jury.

After voir dire, petitioner's motion for a change of venue was denied.

HOW THE ISSUES WERE RAISED BELOW

A. Venue

Prior to his trial, petitioner moved for a change of venue, which despite the trial court's initial fears concerning an impartial jury, was denied. Petitioner on appeal claimed the denial of the motion violated the state and federal constitution. The Oklahoma Court of Appeals upheld the denial of this motion for a change of venue on the grounds that it is only when a criminal defendant established by "clear and convincing evidence that a fair trial is a virtual

impossibility, that such a motion should be granted." (App. A2.) The Court in reaching this conclusion relied upon its own prior decisions interpreting the requirements of the federal constitution as enunciated in Irvin v. Dowd, 366 U.S. 717 (1960.) There is no indication that the Court independently reviewed the voir dire.

B. Prosecutorial Misconduct

A portion of this petition relates to the improper conduct of the prosecuting attorney. The issue was raised on appeal. The court below found that since no objection had been raised to many of the statements at the trial it would review only for fundamental error. It found none. A special concurring opinion condemned the conduct of the prosecutor. (App. A.)

REASONS FOR GRANTING THE WRIT

This case involves issues of constitutional importance which should be decided by this Court. First, the decision of the lower court on the issue of a right to a change of venue to insure the sixth amendment right to a fair trial is inconsistent with the decisions of this Court. To the extent the decision below is not inconsistent with this Court's decisions, this case raises constitutional issues which have not been definitively decided by the Court and are of significance to not only this case, but also to many presently pending and future death penalty cases. The decision on the venue question of the Oklahoma Court also conflicts with decisions of other state courts of last resort. This Court should also decide whether the arguments made by the prosecutor are constitutionally permissible. Such a decision will have great significance for the conduct of many death penalty cases.

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE THE IMPORTANT CONSTITUTIONAL QUESTION OF WHETHER IN A DEATH PENALTY PROCEEDING A DEFENDANT IS ENTITLED TO A CHANGE OF VENUE BASED ON A PRESUMPTION THAT DUE TO THE TOTALITY OF THE CIRCUMSTANCES THERE EXISTS A REASONABLE PROBABILITY THAT HE CANNOT RECEIVE A FAIR TRIAL BY AN IMPARTIAL JURY

A. Applicable Supreme Court Precedent

The right to an impartial jury is guaranteed by the Sixth Amendment to the United States Constitution and is implicit in the requirement of the Fifth Amendment that "no person shall ... be deprived of life, liberty or property without due process of law." Rideau v. Louisiana, 373 U.S. 723, 726 (1963); Irvin v. Dowd, 366 U.S. 717 (1960). Where the state affords a jury trial, the accused is entitled to a fair trial in a fair tribunal as a basic requirement of due process. Groppi v. Wisconsin, 400 U.S. 505, 508 (1971).

This Court has had numerous occasions in recent years to define the right to a change of venue to ensure an impartial panel of jurors. One such case was Irvin v. Dowd, 366 U.S. 717 (1960), where the defendant in a capital case had been denied a change of venue. The Court in Irvin recognized that the right to trial by jury is one of the most priceless of rights preserved from the English system of jurors. 366 U.S. at 721. This right grants the accused a fair trial by a panel of "impartial" and "indifferent jurors." 366 U.S. at 755.

In Irvin the court established that the focus of the trial court should be on the issue of whether adverse publicity would prevent jurors from providing a fair verdict. The Court held that normally "it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in the court." 366 U.S. at 723. The Court went on in Irvin to hold that adverse pretrial publicity can create such a presumption of prejudice that jurors claims of impartiality cannot be believed. See Patton v. Yount, 104 S. Ct. 2885 (1984).

In Rideau v. Louisiana, 373 U.S. 323 (1963), the court held that due process required that a change of venue be granted when there had been extensive pretrial publicity including an interview by the defendant where he confessed to the crime. The court in Rideau presumed that given the substantial adverse publicity that existed prior to trial of that case, jurors could not be impartial.

Subsequent to Rideau, the burden of showing essential unfairness of trial in a given venue has been lifted where the circumstances have revealed a probability that prejudice will result:

> It is true that in most cases involving claims of due process deprivation we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the state involves such a probability that prejudice will result that it is deemed inherently lacking in due process.

Estes v. Texas, 381 U.S. 532, 542-43 (1965); Murphy v. Florida, 421 U.S. 794 (1975); Sheppard v. Maxwell, 384 U.S. 333 (1966); Turner v. Louisiana, 379 U.S. 466 (1965).

B. The Court's Prior Precedents Do Not Resolve Whether The Totality of Circumstances Surrounding the Trial Setting In Combination With Adverse Pretrial Publicity Can Create a Presumption of a Reasonable Possibility of an Inability to Obtain an Impartial Jury.

The court's decisions discussed above have focused exclusively on the effect of extensive adverse pretrial publicity. In the present case the pretrial publicity was perhaps not as pervasive as in Sheppard, Rideau or Irvin. However, given the prominence of the victim, the size of the community, and the "friendless defendant", the pretrial publicity may have had as great or even greater impact than that in Rideau or Irvin.

The present case thus raises significant constitutional issues not addressed by this Court's prior decisions on the

constitutional right to a change of venue to preserve the right to a fair trial by an impartial jury. First, can the totality of circumstances surrounding the impartiality of prospective jurors be such that there should be a presumption of impartiality which must be rebutted by the State. Although this presumed prejudice is somewhat suggested by the court's prior decisions, unaddressed by this Court is whether other factors such as size of the town, the prominence of the victim and the manner in which voir dire is conducted must be considered in determining whether to apply the presumption. Other state courts have followed this approach. See e.g., Martinez v. Superior Court of Placer County, 629 P.2d 502 (Cal. Sup. Ct. 1981.) Second, if no presumption is upheld, is the accused entitled to a change of venue based upon a well grounded fear of partiality or must there be a demonstration of prejudice by a substantial number of jurors required by the court below.

In sum, the totality of circumstances discussed in more detail below, indicated that petitioner had a well grounded fear he could not receive a fair trial. Under these circumstances petitioner was entitled to a presumption he could not receive a fair trial by an impartial jury.

There was no question that there was extensive adverse pretrial publicity. Almost all of the potential jurors as well as all of the actual jurors had read of the case. All of the jurors as well as the potential jurors either knew the victim, members of the victim's family or were acquainted with the family store. It is obvious from the record that the family store was well known. Many of the potential jurors and some of the actual jurors knew the prosecuting attorney and police witnesses. No one knew the petitioner or his family. The petitioner thus was faced with the prospect of attempting to pick an impartial jury from a pool of people in a small town

who were friendly with the victim or his family and in some cases the prosecutor and witnesses for the State.

Additionally, any chance for minimizing the effects of adverse pretrial publicity was totally destroyed by the voir dire procedures employed by the trial court.

The trial court did not first inquire of the venireman who had read or heard about the case and then voir dire those jurors in private. This is the procedure followed by many courts. See e.g., United States v. Chagra, 669 F.2d 241, 253 n.14 (5th Cir. 1982); United States v. Hyde, 448 F.2d 815, 848 n.38 (5th Cir. 1971); See also ABA Standards Relating to a Fair Trial and Free Press Sec. 3.4(a) 1968.

The first potential juror examined admitted in front of the entire panel that he could not set aside his preconceived opinion. So did five out of the next six jurors. All were excused. Thus, the remaining potential jurors knew of the opinion of their peers and also knew what happened to them when they openly admitted their opinions. From then on the voir dire process was hopelessly tainted and the jurors' statements that they could set aside any prejudice are of questionable value. Murphy v. Florida, 421 U.S. 794 (1975).

Petitioner maintains that in these circumstances he was entitled to a presumption that he was being tried in a hostile community and there existed a reasonable probability he could not pick an impartial jury.

This Court's prior decisions do not address whether circumstances similar to petitioner's can violate the constitutional right to a fair trial. This Court needs to resolve how a trial court should balance the applicable factors to reach a decision effecting a basic constitutional right.

This issue cannot be isolated to the circumstances of this case. There are doubtless countless situations similar to the

setting of this case where the defendant, without clear precedent from this Court, was denied a change of venue. Once the defendant loses this most important constitutional right, his chances of being found innocent are significantly reduced as he is adjudicated subject to local prejudice against him. See Irvin v. Dowd, 366 U.S. 717, 729, (1960) (Frankfurter J: concurring.)

II. THE STANDARD USED BY THE OKLAHOMA COURT IN DECIDING THE PETITION FOR A CHANGE OF VENUE CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

To the extent this Court has decided the appropriate standards for determining when the sixth amendment requires a change of venue, the decision below is inconsistent with those decisions.

The Oklahoma Court found the voir dire conducted by the trial court to have provided an adequate safeguard and held that petitioner failed to demonstrate by "clear and convincing evidence that a fair trial is a virtual impossibility." (App. A2.)

The standard used by the Oklahoma Court is in direct conflict with the constitutional standards established by this Court. First, as previously discussed, the court in Irvin and Rideau recognized that in certain circumstances the essential burden of demonstrated prejudice has been lifted where the circumstances have revealed a high probability that prejudice will result. See Estes v. Texas, 381 U.S. 532, 542-543 (1965).

The Oklahoma courts that heard this case did not make any effort to determine if those circumstances existed in this case, which, as discussed previously, they certainly did. It is clear that the Oklahoma Courts failed to address or consider this Court's clear holding that the setting of a trial can be inherently so prejudicial that there is an inference of actual prejudice. Murphy v. Florida, 421 U.S. 794 (1975). It would

be ludicrous to say in the circumstances of this case, where petitioner was basically tried before the victim's friends and acquaintances that he did not face a hostile community entitling him to an inference of actual prejudice.

Second, the Oklahoma Court of Appeals appeared to focus solely on the results of the voir dire and concluded that because all jurors who admitted preconceived opinions were excused, the petitioner must have been tried by an impartial jury. Again, this focus ignores this Court's focus in Murphy, Irvin, and Rideau on the circumstances of the trial and not merely on statements of the actual jurors that they could set aside any preconceived opinions. In Murphy v. Florida, this Court held that where many prospective jurors admit to a disqualifying prejudice other protestations to the contrary draw into question whether it is probable those jurors are part of a community deeply hostile to the accused. The Court further held that a juror's assurance he is equal to the task is not dispositive.

The Oklahoma Court ignored these standards when it clearly should not have. As noted, five of the first six jurors were excused in front of the entire panel for expressing opinions they could not set aside. To suggest that the remaining jurors statements of impartiality are dispositive is to ignore reality and precedent.[1]

Perhaps most significantly, the "virtual impossibility" standard imposed by the Oklahoma Court is in direct conflict with the standard set by this court. The standard set by this Court is whether there exists a well grounded fear that the totality of circumstances indicate a risk that a fair trial cannot be achieved. Groppi v. Wisconsin, 400 U.S. 505, 510-511 (1971); Singer v. United States, 380 U.S. 24, 35 (1965). This obviously was not the standard employed by the Oklahoma Court.

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1. The trial court's failure to question jurors in sequestration to determine the effects of pretrial publicity has been recognized as a factor to be considered in determining the adequacy of voir dire. Irwin v. Dowd, supra at 728; Patton v. Yount, 104 S.Ct. 2885, 2890 n.10 (1984.)

To impose the "virtual impossibility standard" would emasculate the constitutional protection afforded by the sixth amendment and result in a venue being changed only in rare circumstances. It would leave defendants at the mercy of local prejudice in a great number of cases.

This Court should accept this case to reverse the Oklahoma Court and in doing so leave no question as to the appropriate standard to be utilized in guaranteeing the sixth amendment right to a fair trial.

The importance of the Court doing so is underscored by the facts of this case. This Court cannot permit state courts to interpret the constitution in a fashion which permits condemning a person to death after he has been tried in front of a jury comprised of friends of the victim and family and strangers to him, in an atmosphere of extensive pretrial publicity and admitted preconceived opinions on behalf of potential jurors as well as the actual foreman of the jury.

In the circumstances of a death case this Court under both the sixth and eighth amendments cannot permit the Oklahoma Court to hold as it did. At the very least when we put a man to death, there should be no risk that he was not tried by an impartial jury. To put petitioner to death based upon the standard imposed by the court below would impose that risk.

III. THE STANDARD USED BY THE OKLAHOMA COURT IN DECIDING THE PETITION FOR A CHANGE OF VENUE IS IN CONFLICT WITH OTHER STATE COURTS OF LAST RESORT.

Not only is the "virtual impossibility standard" imposed by the Court below inconsistent with the Court's prior decisions, it is also inconsistent with the standards used by other state courts.

Other state courts have set forth the test for determining when the constitution mandates a change of venue in a fashion almost identical to Groppi v. Wisconsin, namely, whether there

is reasonable likelihood of an inability to obtain a fair trial based on circumstances indicating as likelihood of prejudice. See e.g. Langham v. State, 491 So.2d 910 (Ala. Cr. App. 1986); State v. Brier, 263 N.W.2d 622, 626 (Sup. Ct. Minn. 1978); State v. Cuevas, 288 N.W.2d 525 (Iowa 1980); People v. Gendron, 243 N.E.2d 208 (1968) cert. denied 396 U.S. 889 (Ill. 1969); Com v. Cohen, 413 A.2d 1066 (Pa. 1980); Martinez v. Superior Court of Placer County, 629 P.2d 502 (Cal. Sup. Ct. 1981); Maine v. Superior Court, 438 P.2d 372 (Cal. Sup. Ct. 1968).

The approach followed by the court in California in Martinez v. Superior Court of Placer County, 629 P.2d 502 (Sup. Ct. Cal. 1981), not only is totally inconsistent with the Oklahoma Court, but also considers all of the circumstances suggested by petitioner as having a bearing on the constitutional right to a fair trial.

In Martinez the California Supreme Court relied heavily on the standard for granting a motion for change of venue established in Maine v. Superior Court, 438 P.2d 372 (1968), where the court established the standard based on the precedents of Sheppard, Estes and Rideau. It is clear that Martinez, although citing states cases, is premised upon the California Supreme Court's interpretation of the requirements of the federal constitution.

In Martinez, the court held that a motion for a change of venue should be granted when it is determined that because of the dissemination of potentially prejudicial material there is a reasonable likelihood a fair trial cannot be had without a change of venue. 629 P.2d at 503. According to the Court in Martinez, the phrase "reasonable likelihood" is a lesser standard of proof than "more probable than not." Any doubt as to the necessity for a change of venue must be resolved in favor of the change.

With this standard in mind, a standard one hundred eighty degrees from the Oklahoma Court's clear and convincing evidence and virtual impossibility standard, the Court reviewed the following factors: (1) the extent and kind of publicity; (2) the size of the community where the crime occurred; (3) the nature of the crime; and (4) the standing of the victim and the accused in the community.

The Court noted that in a small community a major case is likely to be embedded in the public consciousness with greater effect. The Court found the size of Placer County, 106,500, was an important factor weighing toward the necessity of a change of venue.

The Court found that the seriousness of the crime also weighed toward a change of venue, as did the grave consequence of the death penalty.

Further, the court observed that the victim's status would engender sympathy and the defendant was "friendless" in the community. Based on the above factors, the motion for a change of venue was granted.

The approach and standard followed by the California Court in interpreting the federal constitutional guarantee to an impartial jury totally conflicts with the decision below. If petitioner had been tried in California, as in many other states, his motion would have been granted. The granting of the writ to review this question to resolve this disparity in approach by the state courts is appropriate.

IV. THE COURT SHOULD REVIEW THIS CASE TO ESTABLISH THAT THE CONSTITUTION DOES NOT PERMIT PROSECUTORS TO APPEAL TO THE PASSION, PREJUDICE AND FEARS OF THE JURY IN AN IMPERMISSIBLE MANNER

The record reveals that from the start of this case until his final word on closing argument the prosecutor was determined to appeal to the jury's fears and to ask for vengeance.

The murder in this case occurred in an isolated area. During voir dire the prosecutor immediately commenced to work on the fears of the jury by asking if they lived in isolated areas and whether they locked their doors. (Tr. 85-88, 123, 152-153. 653-654). Such questions have absolutely no relevance to the ability of venireman to follow the law or be impartial. This type of examination was repeated during the trial. (Tr. 591).

Then during the argument on sentencing the prosecutor really hammered home his message:

> The murder, the deliberate killing of one of the members of this community . . . is a threat to every other member of the community . . . and unless it is punished, then we have no government, then we have no law, then we have chaos and anarchy. It must be done from this courtroom in a lawful manner or no one is safe. The average person can take a hundred locks and put on their doors . . .

(Tr. 740.)

After frightening the jury and appealing to a societal need to put petitioner to death to prevent chaos the prosecutor asked for death "as vengeance for the family that is specifically hurt, vengeance for the community to set an example. . ." (Tr. 741.) The prosecutor continued throughout his argument to urge the jury to make the world a better and safer place to live by putting the defendant to death. (Tr. 742). He appealed to their need to eliminate fear from society so they could go to bed and lock their doors without fear. (Tr. 707-708).

In short, the record is replete with attempts by the prosecutor to improperly appeal to the fears and passions of the jurors.

On appeal, because no objections were made to many of the statements, the court reviewed only for fundamental error and found none. Justice Parks, in a concurring opinion, found much

of the prosecutor's argument to be improper, but concluded it was not grounds for modification of the conviction. (App. A.)

Petitioner urges this court to grant a writ of certiorari to determine whether his sentence of death can be maintained in such circumstances.

The Oklahoma statutory scheme for imposing the death penalty gives the jury the option of recommending a life sentence. The statute specifically requires that the sentence not be the produce of passion, prejudice or any arbitrary factor. 21 O.S. Supp. 1986 Sec. 701.13(c). With a man's life at stake a prosecutor should not and cannot be permitted to play with a man's life.

Petitioner maintains that the type of argument made in this case is not constitutionally permissible.

The overall theme of the prosecutor's argument rendered the sentencing hearing fundamentally unfair and therefore constitutionally intolerable. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Hance v. Zent, 696 F.2d 940 (11th Cir. 1983); Houston v. Estelle, 569 F.2d 372, 377-78 (5th Cir. 1978.)

The Oklahoma Court's decision that there was no fundamental error is unsupported by the record and is unexplained by the court. The concurring opinion gives a hint as to why this conclusion was reached, in part due to the failure to object and the evidence of guilt. However, the evidence of guilt is irrelevant to the question of whether the sentencing hearing was rendered fundamentally unfair. See Hance v. Zant, 969 F.2d 940 (11th Cir. 1983). As for the failure to object, the state in its own brief admitted there are sound reasons for not objecting during closing argument. (States Brief p. 90.)

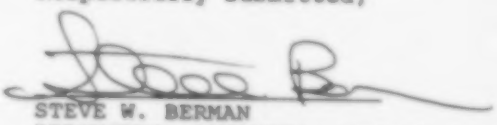
This Court must send out a message to prosecutors throughout this country that the constitution will not permit putting a man to death based on improper appeals to the juror's

passion and prejudice. It is not sufficient for this Court to permit state courts to sweep such misconduct under the rug under the guise of concluding there was no fundamental error. Petitioner asks this court to grant the writ to review the arguments made by the prosecutor and to determine if such conduct can pass constitutional muster. The issues raised by this aspect of the petition clearly arise quite often and a resolution will have a significant impact on death penalty cases.

CONCLUSION

Before any person is put to death, society and this Court must insist that the condemned individual has a fair trial before an impartial jury. The issues in this case raise serious questions concerning the right to an impartial jury which have not been fully decided by this Court, have been resolved differently by different state courts and which clearly have been resolved by the Oklahoma Courts in contravention of this Court's decisions and the United States constitution. A resolution of those issues will not only effect petitioner but will influence the conduct of any future capital cases. Hopefully, this court's guidance will permit other defendants to receive a fair trial prior to being put to death. It is undisputed the issues raised by the petition have national significance. For all of the reasons stated above, petitioner respectfully requests that this Court grant a writ of certiorari to review the decision of the Oklahoma Court of Appeals.

Respectfully submitted,



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DATED: June 1, 1987

APPENDIX

NO. 86-7002

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1987

ROBERT ALLEN BRECHEEN,

Petitioner

vs.

STATE OF OKLAHOMA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF APPEALS

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APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBERT A. BRECHEEN,)
Appellant,)
-vs-) No. F-83-710
STATE OF OKLAHOMA,)
Appellee.)

O P I N I O N FOR PUBLICATION

BUSSEY, Judge:

Robert A. Brecheen was convicted by a jury of Murder in the First Degree and Burglary in the First Degree. Punishment was assessed as the death penalty for the homicide and twenty years' imprisonment for the burglary.

During the evening of March 27, 1983, Hilton Stubbs was awakened by the scream of his wife, Marie Stubbs, and then he immediately heard a gunshot. He saw his wife, who was in the livingroom, fall to the floor. He reached for his gun and rolled off of his bed to the floor. The intruder came to the bedroom door and fired three shots into the empty bed. As the intruder turned to leave, Mr. Stubbs fired at him. The man reached the porch and fired two more shots through the storm door at Mr. Stubbs. Mr. Stubbs again fired at him. He later saw the intruder exit the front gate and walk north.

Though Mr. Stubbs was unable to identify the intruder, he could describe him as wearing a light or tan shirt. When the police arrived, they found appellant severely wounded lying by his truck approximately two hundred yards north of the Stubbs' residence.

Appellant's defense was that some black man had entered his truck as he left a bar. This man made him go to the Stubbs' residence and carry the rifle to the door. When Mrs. Stubbs opened the door, the black man pushed him inside and the gun accidentally went off and killed her. Mr. Stubbs did not see but one person at his home the evening of the killing, but did testify that he was acquainted with appellant who had recently approached him for a loan.

I

Appellant first assigns as error the trial court's refusal to grant him a change of venue for trial. The motion was primarily based upon the fact that the Stubbs owned a local clothing store and practically all veniremen knew who the Stubbs were. The State did not present evidence in opposition to the motion.

Practically all those who were acquainted with the Stubbs were so because they had traded in their store. Some knew policemen and prosecutors. Practically all had read newspaper accounts of the incident.

The fact that jurors know the victims of a crime does not in itself demonstrate the need for a change of venue, just as the mere existence of pretrial publicity is insufficient. It is only when a criminal defendant establishes by clear and convincing evidence that a fair trial is a virtual impossibility that such a motion should be granted. Thomsen v. State, 582 P.2d 829 (Okl.Cr.1978). A defendant is not entitled to a jury which is unacquainted with the victims or facts of his or her case.

An exhaustive voir dire was conducted at trial. Those who served on the jury stated they could fairly and impartially judge the case on the evidence presented. Those who formed opinions concerning appellant's guilt or doubted their ability to serve impartially were excused. We find there was adequate safeguard of the jury process, Frye v. State, 606 P.2d 599 (Okl.Cr.1980), and the need for a change of venue was not established.

II

A venireman named Price was voir dired concerning his views of the death penalty. Initially he stated he was against the death penalty but would "go along with the rest of them" if appellant was convicted. Upon more penetrating examination, he stated he could not imagine a case in which he would vote for a

sentence of death, regardless of the facts or the law. Appellant contends that since Price never retracted his statement that he would go along with the other jurors, his position concerning the death penalty was not clear and he should not have been excused for cause.

A juror's prejudice against the death penalty need not be demonstrated with "unmistakable clarity" before excusal for bias is proper. Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). If a prospective juror's view of the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath," he may properly be excused from capital sentencing juries. Id. Appellant was not denied a trial by an impartial jury because Price was excused.

III

Appellant contends there was insufficient evidence of a "breaking" to sustain the burglary conviction. But we disagree. It was his testimony at trial that Mrs. Stubbs came to the front door of her home and with rifle in hand, he and the black man pushed their way into the house. Photographs introduced at trial show that there was a glass and screen door as well as a wooden door at the front of the house on this March evening. Appellant testified that Mrs. Stubbs just backed away from them and then screamed. He admitted that they were not invited to come in by the victim.

The statute defining Burglary in the First Degree provides that the offense is committed by:

> Every person who breaks into and enters the dwelling house of another, in which there is at the time some human being, with intent to commit some crime therein, either:
>
> 1) By forcibly bursting or breaking the wall, or an outer door, window, or shutter of a window of such house or the lock or bolts of such window or shutter; or
>
> 2) By breaking in any other manner, being armed with a dangerous weapon or being assisted or aided by one or more confederates then actually present . . . . (Emphasis added).

21 O.S.1981, § 1431. Appellant's own testimony provided sufficient circumstantial evidence of a "breaking" under the statute. Where there is evidence from which the jury can rationally conclude that a defendant is guilty of the charged offense, this Court will not interfere with their verdict. Spuehler v. State, 709 P.2d 202 (Okl.Cr.1985).

IV

He further argues that the jury was improperly instructed concerning the element of "breaking." In this regard, the court advised the jury that:

> [T]he word 'breaking' means any act of physical force, however slight, by which obstructions to entering are removed. Breaking may also occur when entry is obtained by any other manner, such as fraud, trick, or threats being armed with a dangerous weapon. (Emphasis added.)

The definition given is that set forth in the statute except for the italicized portion. The words "such as fraud, trick, or threats," were evidently added by the trial judge as an explanation of the statutory language "in any other manner." This is commonly referred to as "constructive breaking" and we hold that 21 O.S.1981, § 1431 encompasses this definition of breaking.

In Tice v. State, 283 P.2d 872 (Okl.Cr.1955), this Court stated in its syllabus that breaking may be either actual or constructive. This definition of breaking is also consistent with the common law. 4 Blackstone Commentaries, p.226 (Christian's 15th Ed.1809). Therefore, the instruction correctly stated the applicable law. Johnson v. State, 621 P.2d 1162 (Okl.Cr.1980).

V

Appellant further contends in regard to the "breaking" instruction that the prosecutor misstated the law by arguing to the jury constructive breaking. Because of our disposition of the previous assignment, we hold this to be without merit.

VI

Next, appellant assigns as error the refusal of the trial judge to grant a new trial based upon juror misconduct. Appellant for the first time suggested at the hearing on his Motion for New Trial that one of the jurors selected acted

improperly at trial by telling a member of the victim's family that the case was in the bag since she got on the jury panel. The issue was not raised in the original or an amended motion for new trial. Defense counsel never divulged to the trial court the name of the witness or of the juror involved. Due to the surprise of the assignment and of the proffered evidence, the trial court refused to hear it because the assignment was not properly preserved.[1]

This Court remanded this cause to the trial court to conduct an evidentiary hearing. At this hearing, the district court took the testimony of the juror alleged to have made the statement, the person to whom it was allegedly made, the person who overheard it, and that of five other jurors of the panel. The trial judge made a finding against juror misconduct. All the testimony except that of the person who allegedly overheard the statement indicated that it had not taken place. The individual who made the allegation of misconduct had a son who was married to appellant's sister. The trial judge noted that her sympathy toward the appellant may have led her to believe she heard something which she had not actually heard.

A criminal defendant has a right to an impartial jury. Okla. Const. art. 2, § 20. Juror misconduct is an appropriate ground for granting a new trial. 22 O.S.1981, § 952. To be entitled to a new trial, a defendant must affirmatively show that the juror was actually prejudiced against him and that he suffered an injustice as a result. Parks v. State, 457 P.2d 818 (Okl.Cr.1969); Odell v. State, 89 Okl.Cr. 184, 206 P.2d 229 (1949). The evidence of misconduct submitted in support of appellant's motion for new trial was insufficient to prove actual prejudice. The trial court allowed five of the jurors to be called and questioned concerning the attitude and behavior of the allegedly errant juror. They unanimously indicated she did not appear prejudiced against the appellant or for the victim. The

[1] This rule requiring issues to be preserved in a motion for new trial was subsequently changed. 22 O.S.Supp.1986, § 1054.1.

trial court did not abuse its discretion in denying the motion.

VII

Appellant next contends that the trial court erred in not granting defense counsel access to the victim's husband's home where the homicide had occurred. He alleges that this denied him due process of law.

The hearing transcript reveals that the trial judge did not believe he had the authority to grant defense counsel the right to enter the private residence. He therefore declined to do so. The judge suggested, and appellant's counsel agreed, that Mr. Stubbs should just be requested to allow a viewing. The record does not indicate the results.

Appellant failed at the hearing, and now on appeal, to provide authority in support of his request. He concedes that there are no cases on point with his position. He analogizes a case in which this Court held a trial court erred in not ordering exhumation of the bodies of two murder victims to allow ballistic tests to be made. Quinn v. State, 54 Okl.Cr. 179, 16 P.2d 591 (1932). That case is clearly distinguishable since it concerned the gathering of important evidence not otherwise obtainable. Here there were photographs and a diagram introduced which portrayed the crime scene.

The record does not disclose whether trial counsel, who is not appellate counsel, was denied access to the property. He did not object to the course of action suggested by the trial court. Appellant has failed to establish preserved error which injured him. Smith v. State, 656 P.2d 277 (Okl.Cr.1982).

VIII

The trial court allowed the prosecutor on rebuttal to show a film to the jury from a pretrial news broadcast which showed appellant moving up and down the arm which was shot by Mr. Stubbs. The defense had introduced testimony from a doctor who had examined appellant and who stated that appellant would have been incapable of firing shots back at Mr. Stubbs because of the injury to his arm. On rebuttal, the State presented the testimony of one of the doctors, Dr. Scott Malowney, who treated appellant

the night he was shot. He stated that if appellant was able to move his arm up and down, he was probably able to use his arm immediately following his injury. At the time the film was made, and at trial, appellant wore a prosthesis on his wrist and fingers. Appellant complains that this was misleading because he could not have had the same range of motion immediately following the injury when he was without the prosthesis. Appellant also argues that the film should not have been admitted because it was irrelevant and it emphasized pretrial publicity. We disagree.

Appellant presented evidence that he would have been unable to shoot his rifle at Mr. Stubbs due to the injury Stubbs inflicted. The evidence was relevant to refute this assertion, his ability to shoot having been made a material fact. Cherry v. State, 544 P.2d 518 (Okl.Cr.1975). As previously discussed, almost all the jurors were aware of pretrial publicity but stated they could set aside any opinions they held. Also, the appellant presented his own expert's testimony and cross-examined the State's expert concerning the change in his ability to use his arm without the prosthesis.

The admission of evidence at trial is a matter within the trial court's discretion. The ruling will not be disturbed in the absence of abuse of that discretion. Owens v. State, 665 P.2d 832 (Okl.Cr.1983). We do not agree with appellant that the trial court abused its discretion.

IX

Appellant contends that error occurred when the State called a rebuttal witness whose testimony tended to impeach the credibility of appellant's fiance, Sherry McComber. The testimony of Ms. McComber concerning whether she and appellant had entered a contract in Ada, Oklahoma to purchase wedding rings was disputed by the jeweler, Mr. Criswell, with whom they dealt.

We agree with appellant that the issue of whether an agreement to purchase the rings had actually been reached was a collateral issue and not a proper subject for rebuttal. Robison v. State, 430 P.2d 814 (Okl.Cr.1967). However, we do not find actual prejudice to have resulted to appellant. Mills v. State,

594 P.2d 374 (Okl.Cr.1979). Appellant's testimony contradicted Ms. McComber's on this point and her statement appears to have been only a misunderstanding of the transaction. We do not agree that a great deal of confusion was caused for the jurors. This assignment is without merit.

X

The defense called Dr. Lannie Anderson to testify concerning the injury to appellant's arm. Dr. Anderson is the surgeon who attempted to repair the damage to appellant's arm caused when Mr. Stubbs shot at the intruder. Mr. Stubbs said the intruder fired two more shots toward the door after he left the house. Appellant tried to prove by Dr. Anderson's testimony that he was unable to fire the .22 calibre rifle because of his wound.

On rebuttal, the State called Dr. Malowney to testify. He was the doctor who treated appellant in the emergency room in Ardmore and again after he returned from Oklahoma City where he had had surgery. He was also married to a woman who worked for the prosecutor. This fact was not made known to defense counsel. Appellant now asserts that this was exculpatory evidence which should have been made known to him citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

While impeachment evidence may be exculpatory and require disclosure, United States v. Bagley, 473 U.S. ___, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), it must also be material. In Bagley, the Supreme Court held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 105 S.Ct. at 3384. The mere possibility that an item of undisclosed information might have helped the defense or affected the outcome does not establish materiality. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

As mentioned earlier, Dr. Malowney was called as a rebuttal witness and not in the State's case-in-chief. He was not sought out by the State as an expert witness, but happened to be one of the doctors treating appellant for his gunshot wound.

However, as an expert witness, he based his opinion on medical science. The fact that his wife worked in the district attorney's office does not indicate that Dr. Malowney had a direct, personal stake in appellant's conviction. Compare Bagley, supra (witnesses were to be compensated for their undercover work according to government's satisfaction with the results). There was only a possibility that this information might have helped the defense.

XI

Appellant cites a number of comments made by the prosecutor and contends that they denied him due process of law. A review of the record reveals that there were no objections made to any of the cited comments and no requests that the trial court admonish the jury to disregard them. Due to appellant's failure to preserve error, we will review only for fundamental error. Rushing v. State, 676 P.2d 842 (Okl.Cr.1984). Finding none, we hold this assignment to be without merit.

XII

Police officers arrived at the Stubbs' residence the evening of the homicide to find appellant lying by his truck in a weakened condition. He was taken to a hospital emergency room with a police officer in his company. After about thirty minutes, he made exculpatory statements concerning the shootings while in a "semi-conscious" state. The police officer did not interrogate appellant and testified at trial that Brecheen did not appear to be fully conscious until ten minutes later.

Appellant contends that since the statement was made while he was only semi-conscious, it was not voluntary and should not have been admitted at trial.

Appellant does not claim that he was interrogated by the officer. Had he been, the answers may not have been admissible. Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). When an individual freely and voluntarily offers relevant statements in a partly conscious state, the issue is the weight to be given the statements. This is a factor for the jury to decide. People v. Duncan, 72 Cal.App.2d 247, 164 P.2d 313 (1945); Sutton

v. State, 237 Ga. 418, 228 S.E.2d 815 (1976). The jury was properly instructed that they should decide the weight to be given to his statements if they found the statements were made freely and voluntarily, i.e. "without coercion, force, threats or duress or inducement . . . . " There was no error.

XIII

The day after appellant was wounded, he made a second statement to another police officer who was standing guard at the hospital. He contends that the officer's presence in his weakened condition amounted to interrogation, and that he could not have made a voluntary statement. He claims his will to remain silent was overborne by the psychological pressure, citing Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

Appellant also contends that neither statement should have been admitted because their probative value was outweighed by their prejudicial effect. 12 O.S. 1981, § 2403. This contention is premised on the fact that appellant's weakened condition caused the statements to be worthless. Both statements were exculpatory, but also conflicted somewhat with his testimony at trial. Both pertained to the course of events at the Stubbs' house the night of the homicide.

Again, the weight to be given each statement was for the jury to decide if the jury initially found them to be voluntary, as in fact the trial judge had. See the previous assignment. If there was psychological pressure, it was self-induced and not purposely imposed by law enforcement officers. It was certainly not the type the Supreme Court held to have disqualified the statement in Townsend v. Sain, supra.

XIV

The trial court gave the Uniform Jury Instruction (OUJI-CR813) concerning voluntariness of statements. Appellant contends it was an incorrect instruction because it did not address a person's state of consciousness. Appellant did not object to the giving of this instruction at trial, nor did he offer a proposed instruction. Thus, error was not preserved. Stratton v. State, 643 P.2d 645 (Okl.Cr.1982). Upon our review we

find the instruction given adequately apprised the jury of the law concerning voluntariness. See the two previous assignments. There was no error.

XV

This Court held in Knott v. State, 432 P.2d 128 (Okl.Cr.1967), that when the State introduces into evidence the confession of an accused, it is bound by exculpatory statements contained therein unless shown by the evidence to be false. Appellant contends on appeal that the trial court erred in not giving this instruction to the jury as he had requested at trial.

While appellant cites Knott in support of his argument, we specifically limited our holding therein to instances where the State introduces the confession in its case-in-chief, and where the accused does not testify. Appellant testified at trial and denied making both statements. The instruction was not warranted upon these facts.

XVI

Appellant next argues that reversal was required by an accumulation of errors at trial. We have held numerous times that an accumulation of assignments of error will not warrant reversal if the individual assignments do not. E.g., Woods v. State, 674 P.2d 1150 (Okl.Cr.1984).

XVII

Appellant, for the first time on appeal, argues that the trial court erred in not instructing the jury they could not consider impeachment evidence as proof of guilt or innocence. Yet appellant failed to object to the lack of such an instruction at trial and did not submit one to the trial court. This resulted in waiver at trial. Dodson v. State, 674 P.2d 57 (Okl.Cr.1984). We note also that the impeaching evidence did not comprise a substantial portion of the State's case as it had in Leeks v. State, 95 Okl.Cr. 326, 245 P.2d 764 (1952). Compare Sykes v. State, 572 P.2d 247 (Okl.Cr.1977) (if not requested and not substantial portion of State's case, not fundamental error).

XVIII

Appellant asserts he was denied effective assistance of counsel as guaranteed by the Sixth Amendment because his attorney failed to make objections during the prosecutor's closing argument or to request certain instructions be given to the jury. Such a general assignment of ineffectiveness does not begin to meet the test and standards of constitutional error established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Appellant must not only demonstrate a serious deficiency in counsel's performance, he must also show the deficiency prejudiced the defense so seriously as to make the result of trial unreliable. Id.; Coleman v. State, 693 P.2d 4 (Okl.Cr.1984).

We have reviewed the record and cannot say that trial counsel's performance fell below that of reasonably effective counsel. Johnson v. State, 620 P.2d 1311 (Okl.Cr.1980).

XIX

Appellant contends that there was no great risk of death to anyone other than the homicide victim and that to find the existence of this aggravating circumstance would be an overbroad and unconstitutional application of Oklahoma's death penalty statutes. He urges us to adopt the "distinct act" doctrine applied by the Georgia Supreme Court.[2] He claims that this is the only interpretation of this aggravating circumstance which can pass constitutional muster.

This Court has considered cases of similar facts to this one and have upheld the finding of this aggravating circumstance. In both of the following cases, the second person put at risk was not in the immediate vicinity of the party killed: Ross v. State, 717 P.2d 117, (Okl.Cr.1986) and Cartwright v. State, 695 P.2d 548 (Okl.Cr.1985), cert. denied, ___ U.S. ___, 105 S.Ct. 3538. In Ross, we noted also that the United States Supreme Court has upheld cases in which the sentence of death was so assessed under

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2 The United States Supreme Court mentioned the statutory provision in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859 (1976). It requires that a weapon or device be used which in fact endangers more than one person at a time. Appellant argues that this circumstance could not be present in his case because his .22 caliber rifle was not powerful enough that a projectile could have exited the victim's body.

a statute similar to Oklahoma's. 717 P.2d at 123. This assignment is without merit.

XX

Appellant requests this Court to compare his sentence to that imposed in similar cases, claiming it is disproportionate. Such a comparison is no longer required nor necessary. He cites us to cases in which the individual did not receive the death penalty. Appellant fails to take into account that the juries in those cases may have found the mitigating circumstances exceeded the aggravating. In such a case, the death penalty may not be imposed. 21 O.S.1981, § 701.11.

Additionally, the Legislature recently amended the review this Court is to make in death cases by deleting the proportionality review. 21 O.S.Supp.1986, § 701.13. See Foster v. State, 714 P.2d 1031 (Okl.Cr.1986), cert. denied, ____ U.S.___, 107 S.Ct. 249.

XXI

Appellant next assigns as error the trial court's failure to give a particular instruction listing mitigating circumstances. At trial, appellant did not object to the instructions given nor request and submit any additional ones. Therefore, potential error was not preserved. Dodson v. State, 674 P.2d 57 (Okl.Cr.1984).

The instructions given accurately stated the applicable law. Johnson v. State, 621 P.2d 1162 (Okl.Cr.1980). There was no error.

XXII

Appellant contends the evidence of mitigating circumstances outweighed that of the one aggravating circumstance the jury found to exist.

The jury was specifically instructed that to be authorized to assess the death penalty, they must find an aggravating circumstance to exist beyond a reasonable doubt and that the aggravating circumstance outweighed the mitigating circumstances. 21 O.S.1981, § 701.11. We find upon our review of the evidence that a rational trier of fact could have found beyond

a reasonable doubt that appellant knowingly created a great risk of death to more than one person and that this circumstance was not outweighed by mitigating circumstances. Spuehler v. State, 709 P.2d 202 (Okl.Cr.1985). There is no error.

XXIII

Appellant contends that Oklahoma's death penalty statutes in general (21 O.S.1981, §§ 701.9-701.13) are being applied in an overbroad and, therefore, unconstitutional manner. We have upheld the application of these statutes against such charges in a number of cases: Liles v. State, 702 P.2d 1025 (Okl.Cr.1985), cert. denied ___ U.S. ___, 106 S.Ct. 3291 (1986); Banks v. State, 701 P.2d 418 (Okl.Cr.1985); Ruckols v. State, 690 P.2d 463 (Okl.Cr.1984), cert. denied, ___ U.S. ___, 105 S.Ct. 2050 (1986); Boutwell v. State, 659 P.2d 322 (Okl.Cr.1983). Appellant has not added any new light to cause us to change these holdings.

XXIV

As appellant's final assignment, he charges that the double jeopardy protections of the federal and the state constitutions are violated by his being convicted of both Burglary with Intent to Commit Murder and of Murder from the same transaction. We have previously held that burglary and other offenses committed within the structure burgled do not merge, and conviction of both does not violate double jeopardy protections. Ziegler v. State, 610 P.2d 251 (Okl.Cr.1980). The burglary is complete upon entry with intent to commit a crime. 21 O.S.1981, § 1431. The offenses committed after entry are separate and distinct.

XXV

Our final review is assigned by 21 O.S.Supp.1986, § 701.13(C). As previously stated, we find that the evidence supports the jury's finding of the statutory aggravating circumstance that the appellant knowingly created a great risk of death to more than one person; that being Mr. Stubbs and the homicide victim, Mrs. Stubbs. We do not find the sentence to have been imposed under the influence of passion, prejudice, or any other arbitrary factor.

Finding no error warranting reversal or modification, judgments and sentences are **AFFIRMED**.

AN APPEAL FROM THE DISTRICT COURT OF CARTER COUNTY, OKLAHOMA
THE HONORABLE WOODROW GEORGE, DISTRICT JUDGE

ROBERT ALLEN BRECHEEN, appellant, was convicted in Carter County District Court, Case No. CRF-83-127, of Burglary in the First Degree and Murder in the First Degree. He received sentences of twenty years' imprisonment and the death penalty, respectively. On his appeal, this Court **AFFIRMS** all judgments and sentences.

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OPINION BY: BUSSEY, J.
BRETT, P.J., CONCURS
PARKS, J., SPECIALLY CONCURRING

PARKS, P.J., SPECIALLY CONCURRING:

Although I concur in the affirmance of the judgment and sentence of the appellant, I am compelled to address several instances of improper conduct on the part of the District Attorney for Carter County. First, the improper appeals to societal alarm asserting that, unless the appellant was punished, the community, county and State would be threatened with "chaos and anarchy" are clearly improper and unnecessary. See Cobbs v. State, 629 P.2d 368, 369 (Okl.Cr. 1981). See also Henderson v. State, 716 P.2d 691, 693 (Okl.Cr. 1986) (Parks, P.J., concurring in part, dissenting in part). Second, the prosecutor improperly asked the jury to punish the appellant "as vengeance for the family that is specifically hurt, vengeance for the community to set an example . . ." See Scott v. State, 649 P.2d 560, 564 (Okl. Cr. 1982) ("The vindication of community outrage has been criticized by this Court in Franks v. State, 636 P.2d 361 (1981).").

It is difficult to understand why the State would risk reversal or modification by making such clearly improper and unnecessary comments during closing argument. However, in light of the strong evidence of guilt, the failure to make timely objections and requests for admonishments to disregard, and the failure to show prejudice, it is unnecessary to reverse or modify the conviction. See Elvaker v. State, 700 P.2d 1021, 1022 (Okl.Cr. 1985).

I also write separately to express my view that the application of 21 O.S. Supp. 1985, § 701.13(C), which became effective July 16, 1985, to cases pending on appeal at the time the statute was passed renders the enactment an ex post facto law. See Green v. State, 713 P.2d 1032, 1041 n.4 (Okl.Cr. 1985). See also Foster v. State, 714 P.2d 1031, 1042 (Okl.Cr.

1986) (Parks, P.J., specially concurring). Nevertheless, I have compared the sentences imposed herein with those previous cases either affirmed[1] or modified[2] by this Court, and find the sentence to be proper.

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1 Smith v. State, P.2d (Okl. Cr. 1986); Thompson v. State, 724 P.2d 780 (Okl. Cr. 1986); Walker v. State, 723 P.2d 273 (Okl. Cr. 1986); VanWoundenberg v. State, 720 P.2d 328 (Okl. Cr. 1986); Newsted v. State, 720 P.2d 734 (Okl. Cr. 1986); Brewer v. State, 718 P.2d 354 (Okl. Cr. 1986); Ross v. State, 717 P.2d 117 (Okl. Cr. 1986); Bowen v. State, 715 P.2d 1093 (Okl. Cr. 1985); Foster v. State, 714 P.2d 1031 (Okl. Cr. 1986); Green v. State, 713 P.2d 1032 (Okl. Cr. 1985); Liles v. State, 702 P.2d 1025 (Okl. Cr. 1985); Banks v. State, 701 P.2d 418 (Okl. Cr. 1985); Cooks v. State, 699 P.2d 653 (Okl. Cr. 1985); Cartwright v. State, 695 P.2d 548 (Okl. Cr. 1985); Brogie v. State, 695 P.2d 538 (Okl. Cr. 1985); Stout v. State, 693 P.2d 617 (Okl. Cr. 1984); Nuckols v. State, 690 P.2d 463 (Okl. Cr. 1984); Robison v. State, 677 P.2d 1080 (Okl. Cr. 1984); Dutton v. State, 674 P.2d 1134 (Okl. Cr. 1984); Stafford v. State, 669 P.2d 285 (Okl. Cr. 1983); Coleman v. State, 668 P.2d 1126 (Okl. Cr. 1983); Stafford v. State, 665 P.2d 1205 (Okl. Cr. 1983); Davis v. State, 665 P.2d 1186 (Okl. Cr. 1983); Ake v. State, 663 P.2d 1 (Okl. Cr. 1983); Parks v. State, 651 P.2d 686 (Okl. Cr. 1982); Jones v. State, 648 P.2d 1251 (Okl. Cr. 1982); Hays v. State, 617 P.2d 223 (Okl. Cr. 1980); Chaney v. State, 612 P.2d 269 (Okl. Cr. 1980), modified on other grounds sub nom. Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984).

2 Parker v. State, 713 P.2d 1032 (Okl. Cr. 1985); Kelly v. State, 692 P.2d 563 (Okl. Cr. 1984); Eddings v. State, 616 P.2d 1159 (Okl. Cr. 1980), modified, 688 P.2d 342 (Okl. Cr. 1984); Morgan v. State, No. F-79-487 (Okl. Cr. Nov. 14, 1983)(Unpublished); Johnson v. State, 665 P.2d 815 (Okl. Cr. 1982); Glidewell v. State, 663 P.2d 738 (Okl. Cr. 1983); Jones v. State, 660 P.2d 634 (Okl. Cr. 634 (Okl. Cr. 1983); Driskell v. State, 659 P.2d 322 (Okl. . 1983); Munn v. State, 658 P.2d 482 (Okl. Cr. 1983); Odum v. State, 651 P.2d 703 (Okl. Cr. 1982); Burrows v. State, 640 P.2d 533 (Okl. Cr. 1982); Franks v. State, 636 P.2d 361 (Okl. Cr. 1981); Irvin v. State, 617 P.2d 588 (Okl. Cr. 1980).

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBERT ALLEN BRECHEEN,	)	
	:	
Petitioner,	)	
	:	
-vs-	)	No. F-83-710
	:	
THE STATE OF OKLAHOMA,	)	
	:	
Respondent.	)	

ORDER DENYING PETITION FOR REHEARING AND DIRECTING ISSUANCE OF MANDATE

NOW on this 3rd day of March, 1987, having examined the petitioner's petition for rehearing in the above styled and numbered cause, and being fully advised in the premises, this Court finds that it should be, and the same hereby is DENIED. The Clerk of this Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

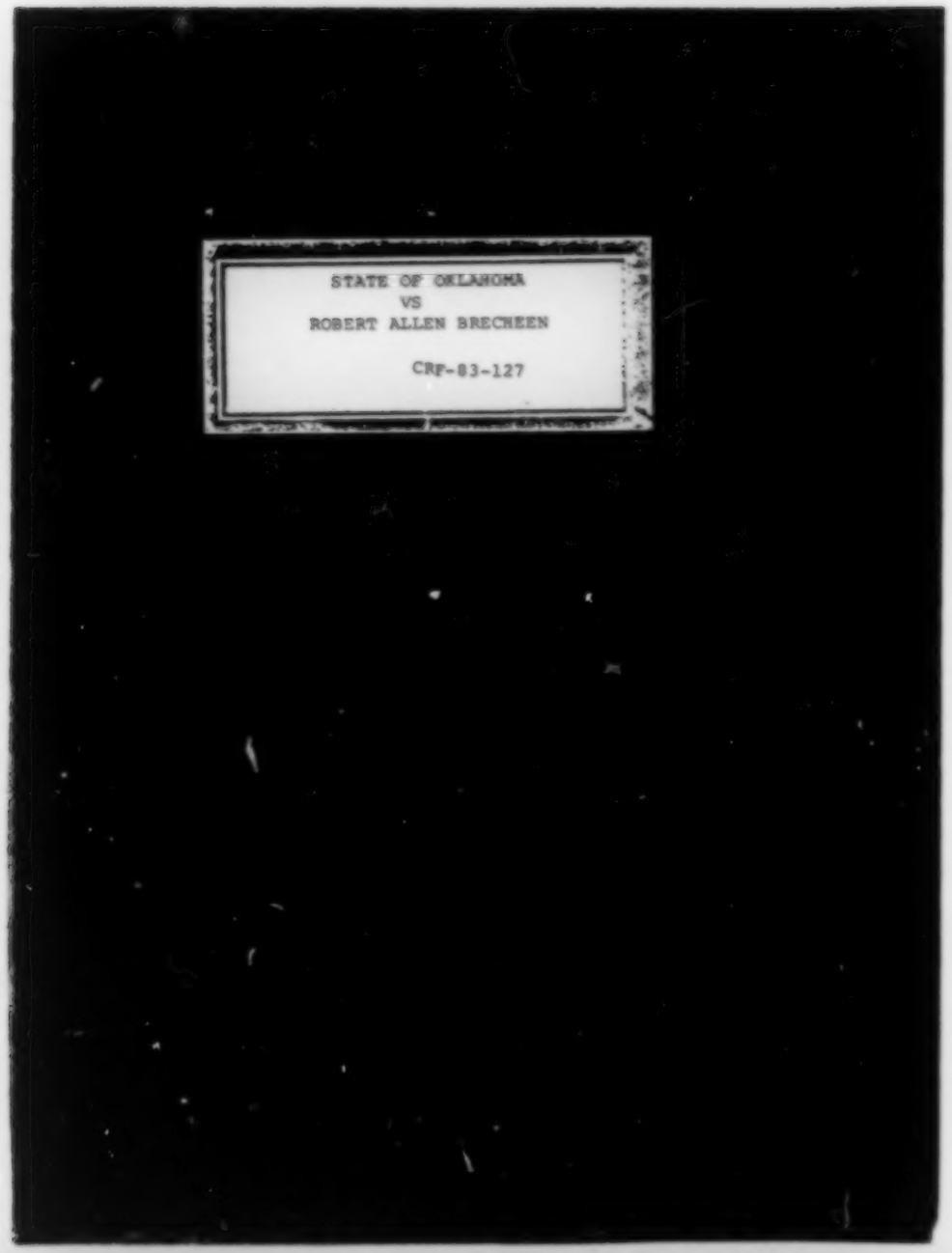
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 3rd day of March, 1987.

Tom Brett
TOM BRETT, PRESIDING JUDGE

Hez J. Bussey
HEZ J. BUSSEY, JUDGE

ATTEST: James Patterson
Clerk

APPENDIX C



THE COURT: The case of State of Oklahoma versus Robert Allen Brecheen, CRF-83-127 is set for trial by jury this day, and the defendant has filed a Petition for Change of Venue, and we're in chambers, out of the hearing of the jurors, or prospective jurors and the defendant appears in person and by counsel, Mr. Gary Sleeper. The State appears by Mr. Ronald D. Worthen, District Attorney. Mr. Sleeper, would you care to present your motion, or petition for change of venue?

MR. SLEEPER: Yes, Your Honor. Court please, the thrust of our motion, or the Petition for Change of Venue, is of course, pre-trial publicity attendant to this matter. I'll advise the court at the outset that we don't take the position that this pre-trial publicity has been outlandish or there has been any undue or prejudicial invasion of Mr. Brecheen's rights as is, not in Ardmore, but has occurred in other places and other cases. In this case, however, the problem is a good bit more subtle. As the court is well aware, most people read the newspaper and watch the television for the purpose of finding out what's going on. Most people, when they read something stated as fact in the newspaper, tend to believe that that is fact. It's very difficult when someone says, later says it's not fact, to convince somebody that the newspaper was wrong or inaccurate in its reporting. In this case, I have some Xerox copies and an original that I'll ask if possibly the reporter can make us a copy of, which we could attach as exhibits to

this hearing. On April the 9th, 1993, the Ardmore newspaper ran a picture of Mr. Brecheen in a bathrobe and a sling, in custody of deputies being brought to court. The caption of that picture says in part, Brecheen, who was shot by the victim's husband was released this weekend from an Oklahoma City hospital. The court wil note that that is a plain statement of fact, that Mr. Brecheen was shot by the victim's husband, not that he's alleged to have been, not that he apparently was, or that he might have been, but that he was. On March 29th, the day after this incident occurred, the newspaper ran a picture of Sergeant Garza of the Police Department examining the back of a pickup truck with what appears to be a pool of blood in it and a rifle. Again, the caption says,"the rifle was found in a pool of blood in the back of the pickup where the alleged assailant was found shot once by the victim's husband." The article again went on to describe the scene of the shooting, describe the number of the shots fired and the rifle that they were fired with. All this is fact, not as the statement of investigators, but as fact. On March 29th, a followup story concerning the filing of charges appeared in the paper without a picture. It says, "Mrs. Stubbs died when she was shot in the head as she answered the front door of her home." It goes on to say, "Brecheen was shot once by the victim's husband", and then it goes on to say, "Brecheen was shot once in the right shoulder with a .38 caliber revolver." Now, I think the

court recognizes that those are statements of evidentiary facts, not attributed to anyone or to the authorities or to the apparent appearance of the evidence, but they are stated as facts. Now, again, the day after the preliminary on this matter, on the 8th of June, appeared an article at the very top of the page headed, DA may seek death penalty in slaying trial, and again, the same allegations of fact were repeated;"Mrs. Stubbs died on Sunday, March 27th, after being shot in the head when she answered the front door of her home around 10:00 P.M. Brecheen had received a single .38 caliber gunshot wound to the shoulder inflicted by Milton Stubbs, who had been asleep in a a nearby bedroom". Even the Oklahoma City newspapers, which are privileged to have a wide circulation in Ardmore, carried the same story, except in the Oklahoma City paper, there was a statement attributed to the police that four shots were fired into a bedroom, and it says that Milton Stubbs chased the intruder out of the house with a .38 caliber pistol, wounding him in the shoulder with one of three shots. Now, those are stated as facts and they're nowhere close to accurate. My point, Your Honor, is that the public does have a right to know. There's no question about that, and I do not seek to restrict the right of the public to know, but we are not talking about a report of facts as a reporter found them. Had the reporter reported that Mr. Brecheen had been shot once in the shoulder, that would have been fine, but when she stated

had shot him, she not only reported something as a fact, that no one has yet established, but there's not a single witness who could testify--at least at the preliminary hearing that could testify directly to that evidence, but yet it appears in the newspaper as a statement of fact. Now, if it was in there as an allegation, or if it was in there as somebody's theory of what happened, then we could overcome that, but when the paper starts making the conclusions that we're supposed to be here today to swear a jury to try, and publishes them on the front page, then the rights of the defendant to get a free and fair and impartial trial are seriously prejudiced. Now, in this case, if we go to trial in Carter County, we're going to have to go out there and face people on the jury who read this newspaper every day and who depend upon it for the news and who rightfully so believe it to be a factual, fair reporting newspaper. Now, I'm not claiming the newspaper is not fair, but in this case, they have failed to qualify what they printed, as allegation and theory and printed it as fact, and we're going to have to go out there and we're going to have to say, now, ladies and gentlemen, you've got to ignore everything that you read in the newspaper, that you've been reading for years and let us start over, and it's easy for the people in that jury box to say, oh, yes, I can do that. It's easy to say, but it's awfully difficult to do. Now, if we were here trying an automobile accident case, or an assault and battery case,

or whatever, it would be one thing, but we're here trying the most serious offense a jury is permitted to try, and I simply cannot bypass my obligation to ask this court to order this trial moved to some venue where the publicity, at least is no more than publicity, and the conclusions the jury is going to have to draw haven't been drawn for them and stated as a fact in the newspaper, and in all candor, that may require moving the case out of this judicial district, which the court is permitted to do where it appears necessary. But if the District Attorney has a strong and clear and cogent case for conviction, then the District Attorney will get the conviction before any good hard working jury. What I'm asking is that the defendant have the same chance and we both start even and I think that's the basis of our criminal law and that's the opportunity we have been denied because of the publicity, and that's the basis of our motion.

THE COURT: Mr. Worthen, do you care to respond?

MR. WORTHEN: Couple of responses, Your Honor. Number one, the preliminary hearing in this case was held on June 7th. This motion wasn't filed till August 17th, approximately a week ago. The articles Mr. Sleeper has talked about are several months prior to the filing of a motion. I counted five articles referred to. Four of those were prior to the preliminary hearing; one after the preliminary hearing and the one that he quoted as being the most inaccurate was the one in the Oklahoma

examine. I can't demonstrate--I can't call this reporter and cross examine her about the facts in this article. That would be blatant error for me to even try to do that, but yet we're faced with them. Presumably, the jury has read them, and that's a witness, it's a silent witness that I can't cross examine, who is giving what I believe to be inaccurate information stated as fact, and I think that in and of itself is prejudicial.

THE COURT: I am concerned about the questions raised by the motion for change of venue, and frankly, I feel that the right to the accused to a trial before an impartial jury is not one that can be waived or would be lost by lateness in filing of the motion, but we have, so far as I know at this moment, about fifty jurors, veniremen in attendance, and what I feel we should do is this. I'll take your motion under advisement and we'll go out and if we can select, or find, a --twelve impartial jurors. We'll make an effort, at any rate, and we'll see what is the result. If it appears that we cannot assure the defendant of an impartial jury, then I'll grant your motion. I'm concerned about it frankly, and for several reasons, not only the rights of the accused. I'm genuinely concerned that he get a fair trial. I'm also concerned that if we go through a lengthy trial and it should result in a verdict of guilty, then I would not want it to be one that would be subject to grave doubts as to its verdict so that we

Q Is there anything in your relationship or acquaintance--

A No.

Q --with the Stubbs family that would influence you in any way in the trial of this case?

A I don't believe so.

Q All right, Mrs. Salyer, do you know Marie Stubbs, or any any member of her family?

A No, sir.

Q Have you ever traded at Stubbs' Store here in Ardmore? The one I referred to?

A A time or two.

Q You have been a customer there? Anything in that that would influence you in any way in giving both sides a fair trial in this case?

A No.

Q From that fact alone? You're indicating no. Will you state your answer so that the reporter can get it, please.

A No.

Q No. Okay. Mr. Murphey, do you know Marie Elizabeth--or did you know Marie Elizabeth Stubbs?

A No, sir.

Q Or any member of her family?

A No, sir, not really.

Q Have you been a customer in Stubbs' store?

A Yes, sir.

Q Anything in your dealings with the dry goods store and the Stubbs that would influence you in anyway as a juror in this case?
A I don't think so.
Q All right. Mrs. Hudson, do you know any of the Stubbs?
A I just seen Mr. Stubbs in the store. I've traded in the store.
Q In the store.
A I know him when I see him.
Q It seems to be a popular store here. Everyone trades there, or have traded there. Anything in your dealings with the Stubbs and their dry goods store that would influence you in any way?
A No, sir.
Q Mrs. Winchester, do you know any of the Stubbs?
A No, I don't.
Q Have you been a customer in that store?
A Yes, I have.
Q Do you know who waited on you?
A No, I don't, not by name.
Q Not by name. Is it fair to assume then that nothing has occurred there that would influence you in any way in the trial of this case?
A Yes.
Q Mr. Hodges, did you know the alleged victim, Marie

A No, I don't know who it was that waited on me.
Q I gather from the way you answered my question that there is nothing that--nothing from the mere fact you have traded in that store that would influence you in the slightest way in this case; is that correct?
A That's right.
Q All right. Mrs. Cummings, did you know Marie Elizabeth Stubbs or any member of her family?
A No, sir.
Q Have you been a customer in Stubbs' store?
A No, sir.
Q No? All right. Mrs. White?
A Yes.
Q Did you know Marie Elizabeth Stubbs?
A No, sir.
Q Any member of her family?
A Through the store.
Q You have traded at the store.
A Yes, sir.
Q You then came in contact with Mr. Stubbs, perhaps?
A I suppose.
Q You suppose you might have. But you don't really know Mr. Stubbs.
A No, sir, I don't.
Q All right, but is there anything in the fact you have

traded in the store that would influence you in anyway?
A No, sir.
Q Mrs. Guthary, did you know Marie Elizabeth Stubbs or any member of her family?
A No.
Q Have you traded in the Stubbs' store?
A No, I haven't.
Q No, you haven't. All right. This alleged incident, about the time it occurred and in the course of the progress of the case through the court, there has been publicity in newspapers and I assume by the radio and on the television. Mr. Justice, have you read about or seen or heard anything concerning this case before today?
A Yes.
Q Have you, by reason of having read anything concerning this case, or heard it on the radio or seen and heard it on the television set, formed an opinion as to the guilt or innocence of the accused person?
A Yes.
Q You say you have. Would that require evidence to remove?
A Do what now?
Q Well, let me ask you this.
MR. SLEEPER: Approach the bench, Your Honor.
THE COURT: Yeah.
(Both counsel approached the bench and held discussion

in this court, and notwithstanding the fact you've heard something before today, and you formed an opinion as to the guilt or innocence of the defendant, do you feel that you could sit as a juror here and lay aside all that you've heard or seen before today and ren'er a just and impartial verdict based solely upon the evidence presented to you during the course of the trial?
A Possibly.
Q Possibly. All right. Suppose that I lost my mind all of a sudden and said I'm going to stop this trial now, I want you twelve jurors to go back to the jury room and deliberate this case, decide this case, and you took my advise and you decided you would go back and you would actually vote. How would you vote?
A I don't know, with no defense, I would have to vote guilty.
MR. SLEEPER: Approach the bench, Your Honor.
(Counsel approached the bench and held discussion with the court outside the hearing of the jurors, as follows:)
MR. SLEEPER: Let the record show the juror has made that statement in the presence of not only of this panel of twelve, but the entire fifty panel of veniremen, and at this time, move for a mistrial, this having tainted the jurors and challenge for cause.
THE COURT: Well, we'll go on and see here. All right, Mr. Justice, you may be excused. Call the name of another juror.

thing I mentioned a moment ago and said we're going to stop the trial and I would ask you to go back with the other jurors and vote and you say, all right you were going to do as I asked, you were going to vote, how would you vote?

A Are they asking for the death penalty?

Q Besides that fact. Perhaps I shouldn't ask this question. It's a tricky question.

A All right.

Q Let's go back over that again. The defendant is assumed --presumed to be innocent. The State has to prove his guilt beyond a reasonable doubt through evidence presented. If you had heard no evidence, how would you vote?

A If I had heard no evidence, I wouldn't know how to vote.

Q Of course, you wouldn't, but if you had to vote, how would you have--what would your verdict have to be?

A Judge, I really don't know how to answer that.

Q I'll not ask that anymore. It has to be not guilty, if you have heard no evidence.

A I'm sorry.

Q It would have to be not guilty.

A Maybe so; maybe so.

Q Yes. Mrs. Salyer, have you heard or read anything about this case before today?

A Yes, sir.

Q Have you formed an opinion as to the guilt or innocence

of the defendant?

A Well, yes.

Q You say you have.

A At the time--at the time I read it, yes.

Q But notwithstanding that, could you set aside anything that you read or heard before today and fairly and impartially deliberate the question of the defendant's guilt or innocence based solely upon the evidence you hear from this courtroom?

A Probably so, but I would rather be excused.

THE COURT: I believe I'll excuse Mrs. Salyer.

(The Clerk called the name of Richard Schuman.)

THE COURT:

Q Good morning, Mr. Schuman, you live in Ardmore?

A (Prospective Juror, Schuman) Yes, sir.

Q What is your business or occupation?

A Retired.

Q What did you do before that?

A Carpenter.

Q Are you married?

A No, sir.

Q Do you know Robert Allen Brecheen?

A No.

Q Mr. Gary Sleeper?

A No.

Q Do you know Mr. Donald D. Worthen?

A No.

Q Did you know Marie Elizabeth Stubbs?

A No.

Q Had you been a customer of Stubbs' Mens Store?

A Lots of times.

Q Lot of times. To your knowledge, did you meet Mrs. Stubbs and/or her husband?

A Oh, I met him.

Q You know him. Do you know him outside of your dealings in the store?

A No.

Q Anything in your acquaintance with Mr. Stubbs that would influence you in any way?

A I don't think so.

Q Have you read or heard anything about this case before today?

A Sure.

Q Sure, you did. Could you lay aside what you heard about this case before today and render a verdict based solely upon the evidence you hear during the course of this trial?

A I don't think so, not as much as I've heard about it.

THE COURT: Excuse Mr. Schuman.

(Clerk called the name of Donita Raney.

THE COURT:

Q You live in Ardmore?

A (Prospective Juror, Raney) Uh-huh.

Q What is your business or occupation?

A Work at Citizens Bank.

Q Citizens Bank. Are you married?

A No.

Q Do you know Robert Allen Brecheen?

A Not personally. Not personally.

Q That implies you might know him some other way.

A He had an account. He had his account at our bank at one time.

Q I see. Have you waited on him as a customer of your bank?

A No.

Q Did you know Marie Elizabeth Stubbs, or any member of her family?

A I know their daughter.

Q You know their daughter. Is that a close, personal relationship, or casual?

A She was my father's secretary.

Q Anything in your acquaintance with the daughter of the alleged victim that would influence you in any way?

A No.

Q Have you heard about this case before today?

A I've heard about it. I haven't read anything about it.

Q You didn't read anything about it, but you heard about it. Can you set aside what you've heard about the case before

today and render a fair and impartial verdict based solely on the evidence you hear during the course of this trial?

A I believe so.

Q Do you know of any reason you could not fairly and impartially try this case?

A No.

Q Mr. Murphy, did I ask you if you're acquainted with the Stubbs? I did, didn't I?

A Yes.

Q Have you read or heard anything about this case before today?

A Some, yes, sir.

Q I want you to search your mind and your conscience now, and tell us, do you feel that you can set as a juror in this case and give both sides a fair trial, setting aside what you have--may have heard about the case before today and render a verdict based solely upon the evidence presented to you in this courtroom.

A Yes, sir.

Q Okay. Mr. Newsome, have you heard anything or read anything about this case before today?

A Yes, sir, and I've been thinking, fair to that defendant over there, I don't believe I could. I'd be prejudiced.

Q You think you would.

A Yes, sir, I know her and I know him.

A I don't think so. I've seen them, but that's all.

Q Have you been a customer of the store?

A I must have sometime during all the time. I don't really recall it, but I think I must have.

Q Anything in that fact that would influence you?

A Not that I know of.

Q Have you read or heard anything about this case before today?

A Oh, yes.

Q Do you feel you could set as a juror and give both sides a fair trial, laying aside anything you've heard before today or read before today and return a verdict based solely upon the evidence presented to you in this courtroom?

A I doubt it.

THE COURT: Mr. Norton, you may be excused.

(Clerk called the name of Johnny Jackson.)

THE COURT:

Q You live in Ardmore.

A (Prospective Juror, Jackson) Yes, sir.

Q What is your business or occupation?

A I work at Uniroyal.

Q Are you married?

A Yes, sir.

Q Is your wife employed outside the home?

A No.

and give both sides a fair trial, laying aside anything you've heard before today and return a verdict based solely upon what you hear or was presented to you during the court of this trial?

A I think so.

Q All right, thank you. Mrs. Hudson, have you heard or read anything about this case before today? Have you read anything about it?

A Yes, sir, I read it in the paper.

Q I want you to search your mind and conscience now and tell us this. Can you set as a juror and give both sides a fair and impartial trial, based solely upon the evidence that's presented to you in this trial, laying aside all that you may have heard or read about it before today.

A Yes, I think I could.

Q Mrs. Winchester, have you heard or read anything about the case before today?

A I read the newspaper account.

Q Do ~~you feel~~ that you can give both sides a fair and impartial trial, under the law which affords to the defendant the presumption of innocence, and that you can return a fair verdict based solely on the evidence presented to you during the course of the trial, uninfluenced by anything you may have read or heard before today?

A Yes, sir.

Q Mr. Hodges, have you heard or read anything about this

Q And I assume it's fair to say you knew her on August 24th, 1983.

A Casually, yes.

Q When you say casually, will you tell us what you mean by casually?

A I did not personally know her. I could pick her out in a crowd, but I did not personally know her.

Q After the jury selection, did you, in fact, have a conversation with her?

A I did not.

Q Now how--when you say you knew her casually, could pick her out in a crowd, how is it you came to know her?

A Everyone in town knows the Stubbs, I think.

Q The question is, ma'am, why--Barbara Stubbs, Barbara Lyons, how did you come to know her? You could pick her out in a crowd.

A I did not know her name was Lyons. I just--I can pick her out. I've seen her before. I've seen her in town before.

Q You knew her as Barbara Stubbs.

A I did.

Q And when you saw her in town, who pointed her out to you?

A Well, no one. I've lived here 33 years and--

Q How did you come to know her name, prior to the jury selection?

A With the store downtown.

Q You visited the store?

Q Can you return a verdict based solely upon the evidence presented to you during the course of the trial, uninfluenced in any way by what you've heard or read about it before today?
A Yes.
Q Mrs. Cummings, have you read anything about the case, or heard anything about it?
A Not that I remember.
Q You don't remember if you've read or heard anything about it.
A But then I don't subscribe to the newspaper regularly. I only get my news from the TV and sometimes I'm busy at six o'clock, and so Imiss it, and so I don't remember hearing anything at all about it.
Q Do you know of any reason why you could not fairly and impartially try this case?
A No, I don't.
Q Mrs. White, did you read or hear anything about the case?
A Yes, I saw it in the paper.
Q After searching your mind and conscience, what do you say? Can you sit as a juror, disregarding anything you may have read or heard about the case and render a fair and true verdict, based solely upon the evidence presented to you in this courtroom?
A Yes, sir, I feel that I can.
Q Mrs. Guthary, have you read or heard anything about the

is filed, the State is required to list and provide the defendant with a list of the witnesses that might possibly be called at the trial to testify. I would like to read for you a list of the names and ask you to think about whether or not you are related to or know any of these witnesses: Hilton Stubbs, of Ardmore; Frank Chambers of Ardmore; Doug Inman of Ardmore; Larry Cavener of Ardmore; Tom Williams of Ardmore; Steve Gamble of Ardmore; O. C. Garza of Ardmore; Medical Examiner, Oklahoma City, which will be Dr. Dibdon; Ballistics Specialist, Oklahoma City, Jim Looney; Larry Hignight of Ardmore; Barbara Lyons of Wilson; Larry Hoklctubbi of Lone Grove; Richard Dill of Oklahoma City, Jerry Peters of Oklahoma City; Jane Enos, Oklahoma City, Jimmy Cobb of Ardmore. Are any of you ladies and gentlemen related to any of those individuals I just read to you? Are any of you acquainted with any of those individuals?
Prospective Juror, Winchester: Larry Cavener has been at the school doing career programs for the children.
Q (Mr. Worthen) He presented a program out at your school?
A Yes.
Q Would you classify your acquaintance with him as close friendship, as a close acquaintance or know who he is?
A I know who he is.
Q Have you ever had him visit in your home or anything like that?

A No, I haven't.
Q The fact that you know him, know who he is, do you feel like that you could--that would effect you in listening to any testimony he might present and give him any special weight or credit as you would someone you didn't know?
A It wouldn't.
Q Mrs. Hudson.
A (Mrs. Hudson) I know Larry Cavener; I know Tom Williams. I went to school with Larry Cavener.
Q Tom Williams first. Would you classify it as a friend? Is that a friendship where you visit in one another's homes or just--
A No, sir, I just see him on the tennis court.
Q Okay. The fact that you've seen him at the tennis court and are friends with him, would that effect you in listening to the testimony if he's called as a witness in this case?
A No.
Q Do you feel like you could listen to his testimony and make your decisions about credibility and your decision in the case without regard to your knowledge and friendship you have?
A Yes.
Q And Mr. Cavener, you went to school with?
A Yes.
Q Have you had any acquaintanceship with him since you all

got out of school?
A I just know him when I see him, just to speak.
Q The fact you went to school with him and you know him, could you set that aside and listen to any evidence that he might present just like you would anyone else?
A Yes.
Q Anyone else know any of the witnesses?
A (Mrs. Norris) Frank Chambers. He worked for the City at the same time I did.
Q Would you classify your knowledge of him as being close friends?
A No.
Q Acquaintanship?
A I know he worked at the same time.
Q The fact that he worked there at the same time that you did, could you listen to any evidence that he might present just like you would anyone else?
A Yes.
Q Anyone else?
MR. NORTHEN: This, as the Judge indicated, this is a criminal case. How many of you ladies and gentlemen would be surprised if a police officer wasn't called to testify in a criminal prosecution? You would more or less expect it, wouldn't you? Would you agree with me that the fact an individual is a police officer, simply by that fact alone, does not

articles in those type magazines. My hobby would be sailing.

Q Any particular television program?

A I like a good movie; not really a TV addict.

Q Mr. Talley, do you have any particular reading?

A I look at Popular Mechanics, Popular Science, Reader's Digest.

Q Any particular TV program that you like?

A I like MASH and educational chanels, etc.

Q Any particular hobbies you have?

A Raising plants.

Q Mr. Hodges, what about you?

A I don't particularly read a lot of books. I read magazines on fishing and hunting and livestock magazines.

Q Any particular TV shows you like?

A Not in particular, mostly watch ball games, about it.

Q Any particular hobbies that you like?

A Oh, most of the time spent probably in ranching.

Q That again comes classed more different than hobby, does it not?

A Yes.

Q I haven't heard anybody call ranching a hobby lately. Now, I'm going to start back--no, I'll stay here for a little. You live outside the City of Ardmore?

A (Mr. Hodges) Yes.

Q You live in a rather isolated area or neighborhood or--

A It's a kind of neighborhood, you know.

Q Have any of you ladies and gentlemen ever lived in an isolated area then, or the country?

A (Mr. Jackson) Yes.

A (Mrs. Winchester) Yes.

THE COURT: Let's recess now, Mr. Worthen.

MR. WORTHEN: It's a good breaking point.

THE COURT: Okay, we'll take a recess for lunch, ladies and gentlemen, until 1:15 or shortly thereafter. Do not discuss the case with anyone or permit anyone to discuss it with you. Do not form an opinion or express an opinion. I'll see you at about 1:15. Thank you.

(Court resumed, with all parties present.)

THE COURT: Mr. Worthen, we're ready to proceed, when you are.

MR. WORTHEN: All right, thank you. Anybody still nervous? Did you relax a little bit? I want to cover a couple of things. I guess I'm breaking the chain of thought when we stopped, but a couple of things that happened to me in the last docket we had I thought about a few minutes ago. One, is is that out in the hallway or during the proceedings in this case, if I seem unfriendly or any of my staff seems unfriendly, not speaking, we're not really being unfriendly, we're deliberately avoiding you or anybody that's on the jury panel. My staff has been instructed to do that for several years and

we're not trying to be unfriendly, it's just it creates the impression with somebody, if you're a juror and you're seen talking to me, we may be talking about fishing, but it creates an impression we're talking about the case, myself or my staff are talking to you about the case, and it's just improper, so we may seem unfriendly, but we don't mean to be that way, yet I had to ask a juror to leave my office during the last docket and he got a little upset about that. He just wanted to come in and visit with one of the girls down there and didn't understand what I was talking about. So, we're not being cool. It's just I'm deliberately avoiding you, and so is my staff. They've been instructed to do so, so please don't hold it against us personally. It's necessary because of the trial. You're not only involved in this trial, but during the docket, you'll be involved in a number of them, and it's just best that we not be too friendly or too personable during that time. Another thing happened to me the last docket. We had a juror go to sleep and I've got to try a three day case over. I realize it's hard to come back from lunch and set in here and listen to lawyers talk. It's warm in here right now. I'm warm. If you start getting sleepy, nod off, raise your hand and tell us. Sometimes I can tell the Judge we need a recess or Mr. Sleeper will. If you get to felling that way, please don't feel bad. We appreciate you telling us, I need to stand up and move around; I need to do something to keep from going

to sleep, because we don't like to have to do trials over. That happened to us and there's nothing we can do about it except do it over. It just happens to everyone. Sometimes somebody will get boring, and maybe not even that at all. Maybe they're not even boring, it just happens, so if you see it happening to yourself, please let us know. I think the last question I asked before we broke for lunch was, how many of you ladies and gentlemen had lived in an isolated area, whether it's in town or totally out in the country. Five of you had said that. How many of you ladies and gentlemen lock your doors?

A (Mrs. Barnes) I do.

Q Mrs. Barnes, is there a reason you lock your doors?

A (Mrs. Barnes) I's brought up that way; it's habit. It's also for safety.

MR. WORTHEN: Now, how many can agree with me that --well, how many of you ladies and gentlemen ever watched --well, most of you have watched TV sometime. How many of you watched Perry Mason, Judd for the Defense, used to be on and I think Quincy's on almost every night on one of the chanels. Ever watch any of those shows? Can you agree with me that Quincy, Perry Mason, all those people, have a script they go by; that those are make believe and sometimes that they invent things for show purposes that may not, in fact, exist. Can you agree with that statement? Can you agree with me we're

A Yes.
Q You indicated that you watched the news on TV. Did you also see the news reports concerning this case?
A I can't recall that I did. I don't know why not.
Q Do you recall any radio reports?
A No.
Q Do you recall any conversation you may have had with anybody concerning what you read about this case?
A Not really.
Q You have also indicated that you felt that you could try this case as a fair and impartial juror, even though you read the newspaper; is this true?
A Yes.
Q At the time you read those articles in the newspaper, did you at that time form an opinion as to the innocence or guilt of Mr. Brecheen?
A From what was in the newspaper?
Q Don't tell me your opinion. I just want to know if at that time you formed an opinion.
A Probably so.
Q Thank you very much. Mrs. White, you have also indicated you've been a customer from time to time in Mr. Stubbs' store.
A (Mrs. White) Yes.
Q Would the fact that you're acquainted with him in business, cause you to feel any pressure concerning your decision in this

case?
A No.
Q If you should believe at the close of all the evidence, that Mr. Brecheen is not guilty of this crime, would your relationship with Mr. Stubbs in anyway prevent you from returning that verdict?
A No.
Q You also indicated earlier, I believe, that you had read some newspaper accounts concerning this case.
A Yes.
Q Have you seen any radio--heard any radio or television accounts?
A No.
Q Had any conversations with anyone concerning what you read about this case?
A No.
Q At the time you read these accounts in the newspaper, did you form an opinion at that time concerning the innocence or guilt of Mr. Brecheen, based on what was in the newspaper?
A No.
Q Have you at any time since then formed an opinion?
A No.
Q Do you feel you can fairly and truly try this case?
A Yes, sir, I do.
Q Mrs. Cummings, I believe you said you had not seen any

concerning what you read in the paper?
A No.
Q Based on what you read in the paper, did you, or have you at anytime since then, formed an opinion concerning Mr. Brecheen's guilt or innocence in this matter?
A No, sir, not at all.
Q Do you feel that you're prepared to try this case free of any opinion whatsoever?
A Yes, sir.
Q Miss Raney, you indicated that you were an employee, or are an employee of the Citizens Bank where Mr. Brecheen did his banking for a period of time; is this correct?
A (Miss Raney) Yes.
Q Is there anything about that that would cause you to have any problem whatsoever with sitting as a juror in this case?
A No.
Q You also, I understand, are acquainted with Mr. Stubbs' daughter, Barbara Lyons.
A Yes.
Q As I said, she's listed as a witness in this case. Does that cause you any problem at all?
A No.
Q Also you indicated, I think, you had heard about this case. Did you read it in the newspaper?
A I haven't read anything about it. I heard about it at

work. My supervisor came in.
Q General conversation?
A Yes.
Q Did you at that time, or have you since, formed any opinion about Mr. Brecheen's innocence or guilt?
A No.
Q Do you feel that you're free of any such opinion today?
A Yes.
Q Thank you very much. Mr. Murphey, you indicated that, again, you had been a customer in Mr. Stubbs' store.
A (Mr. Murphey) Yes, sir.
Q I'll ask you the same question. Is there any thing in that relationship that would cause you to feel pressured in any way as a juror?
A No, sir.
Q You also indicated you had read about this case.
A Read or heard televion, I'm not sure. I would rather think I had read about it.
Q At the time you read about the case, or since then, have you formed an opinion about Mr. Brecheen's innocence or guilt?
A No.
Q Do you feel you can try this case free of any such opinion?
A Yes.
Q Mr. Jackson, I believe you also indicated that you had traded occasionally at Mr. Stubbs' store.

customer in Mr. Stubbs' store from time to time.

A (Mrs. Hudson) Yes.

Q Would that cause you any problem with sitting as a juror in this case?

A No.

Q Nothing in that relationship that would in anyway cause you to feel pressured.

A No.

Q You indicated you had also read in the papers about this incident.

A Yes.

Q Have you had any other exposure to it from the media, television, radio?

A No.

Q At the time that you read these articles in the paper, or since then, did you form an opinion concerning Mr. Brecheen's innocence or guilt?

A No.

Q Do you feel you are free from any such opinion today?

A Yes.

Q Thank you very much. Mrs. Winchester, you have in common with most of the rest of the jury that you were a customer in Mr. Stubbs' store. Is there anything in that relationship as far as you're concerned that would cause you a problem?

A (Mrs. Winchester) No.

Q You feel you can try this case regardless of that.

A Yes.

Q Now, you have also indicated that Larry Cavener, I believe, came to your school. Was that for some sort of program or demonstration?

A Yes, it was.

Q Is there anything in your knowledge of Captain Cavener and the occurrences of that day, that would cause you to necessarily give him anymore credibility than you would if it hadn't occurred?

A No.

Q You have also indicated you read the papers concerning this case.

A Yes, sir.

Q Have you heard any radio or television accounts?

A I don't believe I did.

Q Had any conversations concerning this case, from your reading of the newspaper?

A No.

Q From your reading of the newspaper, have you formed any opinion concerning Mr. Brecheen's innocence or guilt?

A No, I haven't.

Q Do you feel you can try this case free of any such opinion?

A Yes.

A (Prospective Juror, Mullenix) Yes, I do.
Q What is your business or occupation.
A I work for the County Superintendent.
Q County Superintendent of Schools.
A Yes.
Q Mr. Henry Hicks.
A Yes.
Q Who kindly provides us with the movie.
A Right.
Q Good. Are you married?
A Yes, I am.
Q What does your husband do?
A He works at the Daily Ardmoreite.
Q Do you have children?
A Yes, sir.
Q Do you know Robert Allen Brecheen?
A No, I don't.
Q Gary Sleeper, his attorney?
A No, sir.
Q Are you acquainted with Mr. Worthen?
A Yes.
Q Do you have dealings with his office?
A No, sir.
Q Nothing in your knowledge of him, or is there anything in your knowledge of him that would influence you in anyway?

A No, sir.
Q Your husband works for the Ardmoreite.
A Yes.
Q Do you read the Ardmoreite?
A Yes.
Q Once in awhile.
A Yes.
Q Have you read or heard anything before this day concerning the matter that--which this trial is about?
A I read it at that time, yes.
Q Do you feel that you can sit as a juror in this case and put aside all that you've heard or seen before today, concerning this matter, and return a just and fair verdict, based solely upon the evidence you hear during the course of this trial?
A I do.
Q Did you know Marie Elizabeth Stubbs?
A No, sir.
Q Do you know any member of her family?
A No, sir.
Q Have you traded in the Stubbs' Western Store?
A My family has, not me personally.
Q But you, personally, have not?
A No, sir.
Q So there's nothing in your connection with that store or

the people who run it that would influence you in anyway, I take it.

A No.

Q Do you know of any reason why you could not sit as a juror in this case and give both sides a fair trial?

A No, sir, I don't.

THE COURT: Okay, you may inquire, Mr. Worthen.

MR. WORTHEN:

Q I believe I'm legal adviser for the Superintendent of Schools on occasion.

A Right.

Q The fact my office provides legal advice, or represents the Superintendent, can you set that aside and listen to the evidence in this case?

A Yes, I will.

Q I don't think I've had to write any opinions so far lately, have I?

A No.

Q Now, were you able to hear at least the majority of the questions I asked earlier?

A I was.

Q I'm sure you're like all of us, you don't want me to go through each one of them again.

A No.

Q And I don't want to ask them all again. Would your

answers be generally the same as that of the other jurors?

A Yes, sir.

Q Now, you realize that the charge in this case is murder in the first degree.

A Yes.

Q We accept the burden of proving this defendant guilty beyond a reasonable doubt.

A Right.

Q Would you agree with me that the determination of guilt or innocence has to be made separate and independent of the possible punishments involved?

A Yes.

Q I expect the court to instruct you that the--there are two possible punishments in a case of this type, if you find the defendant guilty; life imprisonment, or death. In a proper case, in a case where the evidence and the law warrants it, could you consider returning a verdict imposing the death penalty?

A I think so, yes.

Q Have you ever lived in an isolated area?

A No, sir.

Q Do you ever lock your doors?

A No.

Q Okay, tell me something. What's your favorite reading material?

A I like paper magazines. I read schol books for children.

Q Do you have any favorite television program?
A Yes, I like Dallas. I have several. And Dynasty.
Q Dallas and Dynasty.
A Right.
Q Do you have any particular hobbies?
A No, no particular hobbies.
Q Have you or any member of your family ever been the victim of a violent crime?
A No, sir.
Q Would you agree with me that the statements of attorneys are not evidence to be considered; that that evidence must be --must come from the witness stand?
A Right. Right.
Q And did you hear my cookie story earlier?
A Yes, I did.
Q Unless I missed something, I think I said in the middle of that story that there were, in fact, five or six cookies missing from the pan, I believe is what I said. Would you agree with the majority of the people that Robin is probably the one that took the cookies?
A I would think so.
Q I believe the court will instruct you--one of the instructions of the court will give you is that you have a right to interpret the evidence, to use your own common sense and if an expert witness, what we classify an expert witness is

presented, I think the court will tell you that they are qualified, if they are qualified and allowed to testify, they are qualified to state their opinion on a particular thing, but you are not, in fact, bound by their opinion, because they say it doesn't necessarily make you have to follow. That is the decision you have to make. Do you think you can follow that instruction?
A I could.
Q Do you think, if your basic opinion and experience was different from the experts, do you think you could listen to that testimony and grade it and apply that testimony, even though in the back of your mind you wonder about it a little bit, but if he's qualified to state that opinion, could you follow it?
A I think so.
Q If you disagree with it, do you think maybe you could go ahead and disagree with it, if you didn't find a good foundation for that opinion?
A Yes.
Q You can make your own decision. Would you agree with me that on the decision of both guilt or innocence, and on the punishment, is an individual decision that has to be made by each individual juror and then has to be made as a joint jury? Do you agree with that statement?
A I do.

Q Do you think you can make your own independent decision?
A I could.
Q Are you convinced now that lawyers, particularly the DA talks a long time?
A Yes.

MR. NORTHEN: Pass for cause, Your Honor.

THE COURT: Mr. Sleeper.

MR. SLEEPER:

Q Mrs. Mullenix, I assume you also heard the questions I asked.
A I did.
Q Your answers would be essentially the same. Particularly, since you have been a customer at Mr. Stubbs' store, is there anything about that that causes you problems?
A No.
Q You said you had read the newspaper accounts.
A Yes.
Q Did you see any television accounts or hear anything on the radio or have any conversations or discussions?
A No, sir.
Q Did you at the time you read those accounts in the newspaper, or have you since formed an opinion concerning Mr. Brecheen's innocence or guilt?
A No.
Q Do you feel you're in the frame of mind such that you

that you can try this case fairly and impartially?
A I do.
Q Do you feel your frame of mind is such that if you were an innocent defendant in a criminal matter that you would want a person in your frame of mind as a juror?
A Right.
Q Do you, without telling us what they are, do you recall any specific facts from anything you may have read in the paper?
A No, sir, not at this time.
Q If it should happen in the course of testimony in this case, that you should recall that there was some fact in the newspaper that may be different from the testimony that you heard, you understand that nothing in the newspaper is evidence in this case.
A Right.
Q You understand that as far as we're concerned, the only evidence you can consider is what you hear from the witness stand.
A Yes.
Q And you're willing to do that.
A I am.

MR. SLEEPER: Pass for cause, Your Honor.

THE COURT: Defendant's first peremptory challenge. Do not be offended when you are excused. It's no reflection on you whatever. Both sides agree you are fair minded jurors at

A Yes, sir.
Q Do you feel you can try this case well and truly as you will be sworn to do if selected on this jury?
A Yes, sir.
MR. SLEEPER: Pass for cause.
THE COURT: Thank you, Mr. Sleeper. State's third peremptory challenge.
MR. WORTHEN: State would excuse Mr. Wilson.
THE COURT: Mr. Wilson. Thank you, Mr. Wilson.
(Clerk called the name of Delbert McGuire.)
THE COURT:
Q How do you do, Mr. McGuire. Where do you live, please?
A (Prospective Juror, McGuire) I live South of Lone Grove and work at Uniroyal.
Q Are you married?
A Yes, sir.
Q Is your wife employed?
A Yes, Ardmore schools.
Q Ardmore schools. She's working today, I take it.
A Yes, sir.
Q Do you have children?
A Yes, sir.
Q Do you know Robert Allen Brecheen?
A No, sir.
Q Do you know his attorney, Gary Sleeper?

A No.
Q Do you know Mr. Worthen?
A Yes.
Q Have you had dealings with the District Attorney's Office?
A Not directly. I've just been in talking to him a time or two.
Q Anything in your acquaintanceship with him that would influence you in this case?
A No.
Q You've heard us talking about the alleged incident which the State says occurred on or about March 27th of this year, and in which Marie Elizabeth Stubbs was killed. Have you read or heard anything about that incident before today?
A I just read it in the paper.
Q Do you feel you can sit as a juror and put that out of your mind whatever it was that you remember, or what you read--
A Yes, sir.
Q --or saw, and render a fair verdict, based solely upon the evidence?
A Yes, sir.
Q You say you can? Did you know Marie Elizabeth Stubbs?
A When I seen her.
Q Do you know her husband?
A Yes, sir.
Q Any of the members of her family?

A No, sir.
Q How well do you know her husband?
A At the store.
Q Do you trade there?
A Yes, sir, occasionally.
Q Do you know him otherwise? Do you know him outside the store?
A No, sir.
Q If you should find the defendant not guilty in this case, would that cause you to be embarrassed the next time you should see Mr. Stubbs?
A No, sir.
Q Do you know of any reason you cannot fairly and impartially try this case?
A No.

THE COURT: Okay, you may examine, Mr. Worthen.

MR. WORTHEN:

Q Would you agree with me that bias, sympathy or prejudice has no place in this courtroom?
A Yes, sir.
Q Do you feel like you can listen to the evidence of the witnesses and make the decision as an indpendent person as to what happened on this particular date?
A Yes, sir.
Q Can you make that without regard to any newspaper or

consider the death penalty?
A Yes, sir.
Q Do you have any particular favorite reading material, things you like to read about?
A Livestock magazines, hunting and fishing.
Q What about TV programs, do you have any favorites?
A I don't get to watch too many, working three to eleven. When I do, it's sports of some type.
Q I take it your hobbies are hunting and fishing, some other type sports acitivities; is that correct?
A Yes, sir.
Q Have you ever lived in an isolated area?
A Lived in an isolated area.
Q Away from other people.
A How far do you call isolated?
Q Oh, I don't know, not closer than three hundred yards, maybe that's isolated.
A I grew up in a situation like that.
Q What about where you're two or three miles from everybody?
A That's what I'm talking about.
Q Do you ever lock your doors nowadays?
A Do I lock them?
Q Do you lock your doors nowadays?
A Yes.
Q Any particular reason you lock your doors?

A To keep somebody out or keep some thing in.

Q Any particular person you know that you're trying to keep out of there?

A Intruders.

Q There's nobody you know their name.

A No.

Q Just whoever might want to come in, because there's a possibility somebody might.

A Yes.

Q Would you agree with me that the statements of the attorneys are not evidence to be considered in the case. What we're doing right now is not evidence.

A Right.

Q What I say is not evidence; what Mr. Sleeper says is not evidence. The only time it's going to be evidence is the judge tells you what a particular lawyer is saying is evidence.

A Yes.

Q Do you know of any reason in your own mind you cannot be a fair and impartial juror to both sides?

A No.

MR. WORTHEN: Pass for cause.

THE COURT: Mr. Sleeper.

MR. SLEEPER:

Q Mr. McGuire, how long have you been acquainted with Mr. Stubbs through the store, through the business?

THE COURT: We'll take a fifteen minute recess, ladies and gentlemen. Please do not discuss the case with anyone. Do not allow anyone to discuss it with you. Do not form an opinion. Do not express an opinion. Make yourselves at ease and we'll be back in fifteen minutes.

(Court resumed after recess.)

THE COURT: Defendant may exercise his third challenge

MR. SLEEPER: Mr. Hughes.

THE COURT: Thank you, very much, Mr. Hughes.

(Clerk called the name of Bobby Nichol.)

THE COURT:

Q How do you do, Mr. Nichol. No "s" on your name. You live at Healdton.

A (Prospective Juror, Mr. Nichol) Yes, sir.

Q What is your business or occupation?

A Work Haliburton Service at Healdton.

Q For whom?

A Haliburton.

Q I started to say what part of the oil industry do you work for. We get very few people from Healdton that are not connected in some way with the oil industry. Are you married?

A Yes.

Q Is your wife employed?

A Yes, she teaches.

Q Do you have children?

A Yes.
Q Do you know Robert Allen Brecheen?
A No, sir.
Q Do you know Gary Sleeper?
A No.
Q Have you heard of the events involved in this lawsuit before today, or have you read anything about it?
A I might have read something in the paper.
Q You say you might have; are you not certain?
A I'm not real sure.
Q From the way you answer my questions, I get the impression it didn't make a very strong impression upon you.
A No, sir, the way I work, you very seldom get to read the papers or anything.
Q Do you feel you can sit as a juror in this case and if you do remember anything you read or heard about this case, can you put that out of your mind and render a just and fair verdict based upon the evidence that will be presented to you?
A Yes.
Q Have you traded at Stubbs Western Store?
A I've probably been in there about twice.
Q Uh-huh. Did you know or meet Marie Elizabeth Stubbs?
A Not that I recall.
Q Not that you recall. Do you know Mr. Stubbs, her husband?
A Not that I recall.

Q Do you know of any reason you cannot fairly and impartially try this case?
A No.
THE COURT: Okay, you may inquire of Mr. Nichol.
MR. WORTHEN:
Q How long have you lived at Healdton?
A Right at seven years.
Q Are you originally from here in Carter County?
A No, I was living out in West Texas.
Q Are you acquainted with any of the defendant's family?
A No, sir.
Q Were you able to hear all the questions I asked earlier today?
A Yes.
Q Would your answers be basically the same as that of the other jurors?
A Yes, sir.
Q Understand your wife teaches at Wilson.
A Yes.
Q What grade does she teach?
A Sixth.
Q Would you agree with me that the decision in this case must be made solely on the evidence presented here in the court room?
A Yes.

Q Do you feel like you can listen to the evidence and make a decision in your mind regardless of whether or not you've read anything or heard anything about it?
A Yes.
Q Did you know any of the witnesses I've read the list of earlier?
A No.
Q Do you need me to read it over?
A Didn't recognize any of the names.
Q - Can you agree that the determination of guilt or innocence must be made without regard to the possible punishment involved?
A Yes, sir.
Q Do you feel like you can do that?
A Yes, sir.
Q Do you have any personal beliefs or qualms or qualifications about the death penalty in and of itself?
A No.
Q Do you feel like in a proper case, a case if the law and the evidence warrants it, you could return a verdict imposing the death penalty if you found the defendant guilty beyond a reasonable doubt?
A Yes.
Q Do you have any particular thing you like to read?
A Fishing magazines, things like that.
Q Outdoor things?

A Yes.
Q Do you have any particular TV program, favorite TV program?
A Not particularly, whatever's on at the time and can see it.
Q I took it from your comment you work at odd shifts or on call.
A On call twenty-four hours.
Q Okay. Does it give you time for any particular type of hobbies?
A Just on the days off.
Q Now, after listening to us all day, I'm quite certain you've gotten tired of sitting and listening to us talk. Do you know of anything in your own mind why you couldn't be a fair and impartial juror to both sides, listen to the evidence and try this case?
A Nothing I know of.

MR. WORTHEN: I'll pass for cause.

THE COURT: Mr. Sleeper.

MR. SLEEPER:

Q I understood you to say you had traded at Mr. Stubbs' store on occasion.
A Yes, sir, couple of times.
Q Do you know of have you become acquainted with Mr. Stubbs in any other way than that?
A No.
Q Are you acquainted with any member of Mr. Stubbs' family?

A No.
Q Have you or any member of your immediate family been the victim of a violent crime?
A No.
Q Have you served on a jury before?
A No, sir.
Q Have you heard the other questions I've asked the other members of the jury?
A Yes.
Q Would your answers be essentially the same?
A Yes.
Q You have answered Mr. Worthen's question to the effect that you could in a proper case, if the facts warrant it and the instructions of law given by the judge warrant it, return a death penalty; is this correct?
A Yes.
Q And do you also understand, even if you might be instructed upon such circumstances, you don't necessarily have to do that?
A Yes.
Q Mr. Nichol, is your frame of mind such that you feel you can fairly and truly try this case?
A Yes.
Q As I've asked the other jurors, do you believe you're in the frame of mind in which you would like a jury to be, if you were the defendant in a criminal case?

(Clerk called the name of Scott Heller.)
THE COURT:
Q You live in Ardmore, do you not?
A (Prospective Juror, Heller.) Yes, sir.
Q What is your business or occupation?
A Work at Fireside Inn. I'm a waiter.
Q Work where?
A Fireside Dining.
Q Are you married?
A Yes, sir.
Q What does your wife do?
A She works out there with me.
Q Do you have children?
A I have one.
Q Do you know Robert Allen Brecheen?
A No, sir.
Q Do you know his attorney, Mr. Sleeper?
A No, sir.
Q Do you know Mr. Worthen?
A Y es, sir.
Q Have you had dealings with Mr. Worthen, or his office?
A A former employer of mine had some dealings with shoplifting, not directly with him.
Q Former employer of yours.
Q Caught a shoplifter, I did.

Q Anything in that relationship you had with the District Attorney's Office that would influence you in anyway?
A No.
Q --in the trial of this case?
A No, sir.
Q Have you before today, read or heard anything about the incident involved in this case?
A Just conversation. I don't look at the newspapers, except the funnies.
Q So you don't remember reading anything about it in the newspaper?
A Just heard about it by word of mouth.
Q You heard about it by word of mouth. Anything in what you've heard that would be such that you could not put it out of your mind and give both sides a fair trial and return a just and true verdict based solely upon the evidence you would hear during the course of the trial?
A Yes, I could do that.
Q Do you know Marie Elizabeth Stubbs?
A No.
Q Have you traded in Stubbs' store?
A No, sir.
Q Do you know any member of the family of Mrs. Stubbs?
A No, sir, I sure don't.
Q Do you know of any reason why you cannot fairly and

impartially try the case?
A I don't believe so.
THE COURT: Okay, Mr. Worthen.
MR. WORTHEN:
Q Have you gotten tired sitting all day?
A Well, yeah, changed clothes.
Q Pardon?
A Say I went home and changed clothes I got so uncomfortable. That's how come I came in shorts.
Q Well, it gets kind of long up here sometimes. Would your answers be basically the same as that of the other jurors, the questions we've asked all day?
A Yes.
Q Would you agree with me that the evidence to be considered must come from this witness stand and these exhibits that are introduced?
A Yes.
Q Do you, yourself, have any personal qualms or qualifications about the death penalty?
A No, sir, I don't.
Q If you find the defendant guilty beyond a reasonable doubt of murder in the first degree, could you consider returning the--a verdict of death?
A Yes, I could consider it.
Q Now, you said you read the funny papers. Do you have

any other reading material you like to read?
A If I get interested. I usually fall asleep when I'm reading, so I gave up reading.
Q What about TV programs?
A We don't have a television in the home for several reasons but if I can catch All My Children, I like to watch that.
Q Do you have any particular hobbies?
A Yes, I run.
Q Your dad was a runner too.
A Yes, he was a baseball player.
Q Were you acquainted with any of the witnesses that I read earlier?
A No.
Q Some of those were police officers.
A No, sir. I know--I may when I see a face, but names, no, sir.
Q Do you know of any reason in your own mind--I could stand here and ask questions all day and couldn't get to you, that you couldn't be fair and impartial to both sides?
A No.

MR. WORTHEN: Pass for cause, Your Honor.

MR. SLEEPER:

Q Mr. Heller, the shoplifting situation you told us about, did you testify in a criminal case?
A Actually, if I remember, sir, I just wrote it down and I

had to appear in Judge Hisey's court and I believe he asked me if what I testified was correct. It was a juvenile situation.
Q You didn't testify.
A I didn't have to sit like this or stand up.
Q And you said there wasn't anything about that experience that would cause you to lean one way or the other in a case like this.
A No.
Q I'm sorry, I didn't understand where you said you worked.
A I'm a waiter in a restaurant South of town.
Q You also said, I think, that you had had some conversations concerning the incident.
A What I meant, sir, that was the only way that I knew, was just hearing here and there and what not.
Q Did you have conversations about this with more than one person?
A Well, yes, sir, I guess. I mean, it was told to me, you know. Family member said something, my family, and someone I may have worked with commented, but it was just comments about the incident. I had just gotten married, so I was kindly--
Q Was there anything about these conversations that would cause you to form any opinion at that time as to the guilt or innocence of my client?
A No, sir, I don't believe so.
Q Without saying what you might have been told, or what

someone might have said to you, do you recall anyone expressing to you anything concerning his guilt or innocence?

A I think it was just the incident, just exactly what happened, you know.

Q When Mr. Worthen asked you, and you said that you could consider the death penalty in an appropriate case, I'll ask you, sir, if the judge should instruct you that you might consider the death penalty, do you understand you do not have to return the same?

A I understand.

Q That's left to your good judgment.

A Yes.

Q In a case that you did not feel it appropriate, would you refuse to return such a penalty?

A Yes.

Q You've heard the other questions that I've asked the other jurors.

A Yes.

Q Particularly, I'm interested in one. You've understood, I'm sure, what has been said about the burden of proof and the State has to prove guilt in this case. Are you in the frame of mind such that you can tell me after searching yourself, that my client, as he sits here at this moment, is not guilty, as far as you're concerned.

A As far as our laws are written, yes.

Q No, not as far as our laws, sir; as far as you're concerned personally.

A Yes, sir.

MR. SLEEPER: Pass for cause.

THE COURT: Defendant's fifth peremptory challenge.

MR. SLEEPER: Just a moment, please, Your Honor. Mr. Williams, court please.

THE COURT: Mr. Williams, you've been excused. Would you please stay with us a little longer.

(Clerk called the name of Alfred Huffling.)

THE COURT:

Q Mr. Huffling, do you live in Lone Grove?

A (Prospective Juror, Huffling) Yes, sir.

Q What is your business or occupation?

A Car salesman.

Q A car salesman. Are you married?

A Thoroughly.

Q What?

A Yes, sir.

Q Is your wife employed outside the home?

A Memorial Hospital.

Q I might ask you what kind of cars do you sell.

A Any kind you want.

Q Only good cars.

Q Oh, certainly.

Q Just good cars. Do you have children?
A Two.
Q Do you know Robert Allen Brecheen?
A I do not.
Q Or his attorney, Mr. Sleeper?
A No.
Q Do you know Mr. Worthen?
A No.
Q Before today, have you heard or read anything about this case or the events leading up to it?
A Yes, sir, I read it.
Q You read it. Do you feel that you can sit as a juror in this case and put aside whatever it may be that you remember from what you read about this case and give both sides a fair trial and render a just and true verdict, based solely upon the evidence presented to you during the course of the trial?
A Yes.
Q Uninfluenced by anything you may have heard before.
A Yes, sir.
Q Did you know Marie Elizabeth Stubbs?
A No, sir.
Q Have you traded in the Stubbs' western store?
A Yes, sir.
Q Did you become acquainted with Mr. Stubbs in that event?
A He may have waited on me.

Q You're not even sure of that.
A No, sir.
Q Do you know any of the members of the Stubbs' family?
A No, sir.
Q Do you know of any reason you cannot fairly and impartially try this case?
A No, sir.

THE COURT: Okay, Mr. Worthen.

MR. WORTHEN:

Q Sometimes the way he turns around and says okay, I wonder what he's really saying. Have you been able to hear all the questions?
A Yes, I have.
Q Would your answers generally be the same?
A Yes.
Q Do you have any personal qualifications about the death penalty in and of itself?
A None.
Q In a proper case, where the law and the evidence warrants it, could you return a verdict imposing the death penalty?
A I could.
Q Do you feel like that you, as a juror, can listen to the evidence presented in here and make a decision?
A Yes.
Q Do you feel like you can make that decision as to the

question of guilt or innocence without regard to the possible punishment?

A Yes.

Q Will you hold it against any one of us that we've been going all day today asking these questions? I've done that for over a week, asking these questions, so this has gone pretty fast. Do you know of any reason in your own mind, that you can't be fair to both sides?

A No reason.

MR. NORTHEN: Pass for cause.

THE COURT: Okay, Mr. Sleeper.

MR. SLEEPER:

Q You said you read the papers.

A Yes, sir.

Q Do you recall today, again without telling us anything you might remember, any of the details that were published concerning the incident?

A Yes, sir.

Q You do. Do you understand that some of those details that were published in the paper may not appear from this witness stand as facts in this case.

A That's right.

Q Do you understand it will be necessary for you to completely ignore those things you read in the newspaper?

A Yes, sir.

Q Let me ask you, sir, at the time that you read the newspaper and learned the facts that were in the newspaper, and I take it that some of the facts that are--alleged facts at any rate, impressed you because you remember them some three or four months later. Am I correct in that?

A Yes.

Q Did you form an opinion at that time, or have you since, whether or not you still hold it today, concerning the innocence or guilt of my client?

A At that time.

Q At that time. Did you at that time when you formed an opinion make any effort between now and then to change your opinion, or forget it or something cause you not to have that opinion any longer?

A If you're asking me can I dismiss it from my mind, yes.

Q Understand, sir, that you have said you can dismiss it from your mind. I'm asking--I'm now inquiring to determine whether or not we can reasonably ask you to do that. If you still hold the opinion, then we'd be unreasonable to ask you to dismiss it from your mind, would we not?

A That's true.

Q Do you still hold that opinion today, whatever it was you formed at that time?

A Yes.

Q Will you tell me, sir, and there's no harm, no crime in

doing so, are you telling me, sir, that contrary to what these other folks have said, that in your mind at least, that we don't get all of the head start that the law says we're entitled to? See, the law says we're entitled to a jury that's absolutely convinced that this man is not guilty till the evidence starts and if your sitting in that chair deprives us of our full headstart, I want you to tell us.

A I can approach the trial without an opinion as to his guilt or innocence.

Q Are you entirely sure that once the evidence starts, you can dismiss whatever opinion you have earlier formed?

A I think I can.

Q Again, I don't want to argue with you, but thinking you can and knowing you can are two different things. The difference is awfully big. Are you absolutely sure you can?

A I think I can; yes, sir, I can.

Q Thank you.

THE COURT: The State's sixth peremptory challenge.

MR. WORTHEN: Waive sixth.

THE COURT: Defendant's sixth peremptory challenge.

MR. SLEEPER: Mr. Huffman, court please.

THE COURT: Thank you, Mr. Huffman.

(Clerk called the name of Francis Miller.)

THE COURT:

Q Mrs. Miller, you live in Ardmore, do you not?

MR. WORTHEN: No, he's not.

THE COURT: I can't see any grounds for disqualification, at this point.

MR. SLEEPER: Always possible I may call him and if I do, we then would have a situation that would be untenable. I don't--I'm not telling the court I will, but I'm not telling the court it's not possible that I will.

MR. WORTHEN: There's a possibility anybody is going to be called too, but that's not necessarily the standard, Your Honor. I do not think there has been any grounds that he's disqualified her for cause.

THE COURT: Overruled. The State's seventh peremptory challenge.

MR. WORTHEN: State waives seventh.

THE COURT: The defendant's seventh.

MR. SLEEPER: Mrs. Culley, court please.

THE COURT: Thank you, Mrs. Culley.

(Clerk called the name of Sharon Jobe.)

THE COURT:

Q Mrs. Jobe, you live in Ardmore?

A (Prospective Juror, Jobe) Yes.

Q What is your business or occupation?

A I work for the OG&E.

Q OG&E, good. Are you married?

A Yes, sir.

Q And what does your husband do?
A He owns a garage door business.
Q Owns what?
A Garage door business.
Q Do you have children?
A Yes, sir.
Q Do you know Robert Allen Brecheen?
A No, sir.
Q Either of the attorneys involved?
A I know Mr. Worthen.
Q Anything in your acquaintanceship with him that would influence you in any way in this case?
A No, sir.
Q Have you before today, read or heard anything about this case or the events that lead up to it?
A Just the account in the paper.
Q Uh-huh. Do you feel that if selected as a juror, you could lay aside what you may have heard or read before today and render a just and true verdict based solely upon the evidence that will be presented to you during the course of the trial?
A Yes, sir.
Q Did you know Marie Elizabeth Stubbs?
A No, sir.
Q Have you traded in the Stubbs' store?

A Occasionally.
Q Did you know Mr. Stubbs?
A No, sir.
Q Anything in the fact you may have traded in the store, that would influence you in anyway?
A No, sir.
Q Do you know of any reason why you cannot sit as a juror and give both sides a fair trial?
A No.
Q Thank you, Mrs. Jobe.

MR. WORTHEN:

Q Mrs. Jobe, you've heard all my questions I've asked today, including the ones about the penalty?
A Yes.
Q Would your answers be any different than that of any other juror?
A No.

MR. WORTHEN: Pass for cause.

MR. SLEEPER:

Q I'm sorry, I didn't understand your last name.
A Jobe, J-O-B-E.
Q And are you married, Mrs. Jobe?
A Yes, sir.
Q Children.
A Yes, sir.

Q What does your husband do?
A Owns a garage door business.
Q Have you or any members of your family ever been the victim of a violent crime?
A No, sir.
Q You have indicated that you're acquainted with Mr. Worthen. What are the circumstances of that?
A We attend the same church. Our daughters are friends.
Q Do you, or have you visited in Mr. Worthen's home?
A Yes, sir.
Q These are social visits?
A Yes, sir.
Q More than one occasion?
A I don't think so, no, sir.
Q You indicated that you had read some of the newspaper accounts of this incident.
A Yes, sir.
Q Do you recall today any of the facts you read, without telling what you recall?
A No, sir, just that the event happened.
Q None of the details.
A No.
Q Do you remember at the time of reading these articles, whether or not you formed an opinion one way or the other, as to my client's guilt or innocence?

A No.
Q YOu didn't.
A I did not.
Q You've heard the questions I asked the other jurors.
A Yes, sir.
Q Would your answers be substantially the same as theirs?
A Yes, sir.
Q As I told the other jurors, the critical question--there are two. Are you willing to listen to the evidence from that chair, disregarding anything you might have read or heard on television, or the radio, anything you might suddenly remember from the newspaper and evaluate the evidence carefully and render a fair and impartial decision. Can you do that?
A Yes.
Q Are you willing to indulge my client the presumption he's entitled to; that is, that he sits before you at this moment, not guilty.
A Definitely.
Q You are, I take it, going to demand that if he's going to be found guilty, the State is going to have to prove it to you.
A That's right.
MR. SLEEPER: Pass for cause.
THE COURT: State's eighth peremptory challenge.
MR. WORTHEN: State will waive eight.
THE COURT: Defendant's eighth peremptory challenge.

MR. SLEEPER: We will waive the eighth peremptory challenge.

THE COURT: It appears we have a jury selected then. Before I forget it, I'm going to ask the twelve of you to please rise and hold up your right hands.

(Billie Williams, Court Clerk, administered the oath to the jurors.)

THE COURT: I'm going to release the twelve of you until nine o'clock in the morning. I do particularly admonish you, now that you are being permitted to separate and go to your homes, do not discuss this case with anyone. Do not permit anyone to discuss it with you. Do not read any newspaper accounts about it. Do not listen to any radio or television accounts about it. If you want to read the newspapers, have your husbands or wives lay them aside and save them for you till the trial's over, but let me assure you, that no one will know more about what transpires here than you, so you should not be particularly curious about what the newspaper or the radio or television might say, because you know better than anyone what has happened here today. I do ask you though, do not read any newspaper reports, or listen to any television reports about this trial. I'll see you in the morning at nine o'clock, and thank you, very much.

MR. WORTHEN: Are you going to select an alternate?

THE COURT: I'm going to gamble. I hate to select

an alternate juror. It's such a thankless job. You sit there through the whole trial and unless something happens to one of the other twelve, you don't have a voice in the deliberations. You don't even participate in the deliberations, so I really hate to ask anybody to do that, but if one of these jurors should get sick, or get run over by an automobile or something, we would be in a bad fix, but I'm a gambler at heart, I suppose, so I'm not going to ask you. I just don't like to call upon somebody to do that. We have in the past.

(Court recessed and reconvened August 25, 1983, with all parties present and the following hearing was held in chambers outside the presence of the jury.)

THE COURT: As you know, I took the defendant's motion for change of venue under advisement and said that we would attempt to select the jury. I suppose yesterday evening when I did administer the oath to the jury, I might have indicated a decision on my part, but I feel I need to make a ruling on it definitely one way or the other. Do you have anything further, Mr. Sleeper?

MR. SLEEPER: Your Honor, I think that the record on voir dire is pretty clear. We went through forty jurors yesterday to pick the twelve jurors that we have. We have at least ten and I think possibly eleven who indicated that they had read the publicity in the paper. A great many people indicated that they formed an opinion based on that publicity,

A Yes.
Q Was he receiving medication?
A I don't know.
Q Was he receiving any IV from a stand?
A I believe so.
Q Were nurses coming in and out to treat him?
A Yes.
Q Were they giving him shots?
A I don't know.
Q You stayed in the room.
A Yes.
Q How long after he was transferred from the intensive care unit were these statements made to you?
A He never spoke to me till about seven o'clock.
Q Was he asleep until then?
A Part of the time.
Q Did he drift in and out of sleep during that time?
A No, sir. Most of the time he was just resting.
Q He would be--how long had he been asleep when he woke up and first talked to you?
A I don't remember. I don't remember.

MR. SLEEPER: That's all I have.

CROSS EXAMINATION

MR. WORTHEN:

Q Mr. Cobb, prior to going up there, you were directed not

worked his way around the bed at his home, stuck his head out of the bedroom door into the living room and two more shots were fired at him from the area of the front door. He shoots back. He watches out that door and just after his shot, the man shooting at him in a tan shirt, disappears to the North. He watches out that door and the man comes out from the North side of the yard and is going out the sidewalk and out the gate and he's carrying a long black gun and he's wearing his tan shirt North on Refinery Road. He locked the door and calls the police. His wife--he's checking on his wife at the same time he's talking to the dispatcher, and there's no pulse. At 10:00 A.M., Officer Williams and Officer Gambel arrived at the residence. Shortly after Officer Williams arrives at that residence, Officer Inman pulls up a block and a half away at a pickup truck on Akron Avenue and laying beside that pickup truck is a man-he's wounded and you go back inside the Stubbs' house and what do you find? You find Marie Stubbs with a bullet hole in her head. You find three bullet holes in Hilton Stubbs' pillow. You find two bullet holes in the door frame beside where Hilton had been standing. In that floor, you find five .22 caliber hulls. On the stereo, you find a pool of Type A blood. You find the shattered glass of the front door and on the front porch of that residence, you find a pool of blood and you find a trail of blood off the front porch to the back of the house, to the gate at the back, coming back toward

out of the gate, and not seeing two people? Would he have missed that? Everything is going to be burned almost indelible on that day, forever--almost indelible. But, ladies and gentlemen, you take the facts, you follow the blood trail, but as Mr. Sleeper said, you count the cookies--no cookies missing, but ladies and gentlemen, you count the cookies--you've got Mrs. Stubbs missing; she's gone forever. She's gone forever from this world, and he sits there, not chocolate around his mouth, but blood all over him. It's his own blood, but its not just cookie crumbs around the counter. It's a blood trail from her body right to him, and it's his gun and his shells and his truck and his gloves and he comes in here with a phantom story and expects you to reasonably believe it. There's nothing, ladies and gentlemen, nothing but his guilt as he sits there. You have a responsibility, and you, and you, and you, and you, and you, and you, and you, and you, and you, and you, to Hilton Stubbs, and to this society and this county, because, ladies and gentlemen, if you can look Hilton Stubbs in the eye and walk out there and say I believe some phantom black man may have done this, and you honestly think that in your heart--but I don't think any reasonable person that takes this evidence and analyzes it can give it credence, and it doesn't even deserve talking about. That's one of the responsibilities that go into living in this country that's governed by law that allows us to live

in a society where you can go to bed at night and not lock our doors and not be in fear of somebody coming in and take our life for no reason at all and walk up here and say--explain why I did it. It's kind of like Flip Wilson used to say, the devil made me do it. Nobody made him do it. I submit I don't believe the phanton one bit. I ask you--you've got four verdict forms you're going to have when you go back in that jury room. One says, guilty of Murder in the First Degree. One says, Not Guilty. One says, guilty of Burglary in the First Degree as charged in the Information and assess his punishment at---. The fourth one says, not guilty of Burglary in the First Degree. I ask you in this case, at this stage of the trial to fill out the verdict, and sign the form that says guilty of murder in the first degree and I ask you to sign the form that says, guilty of burglary in the first degree as charged in the Information and assess his punishment at--I recommend to you, ladies and gentlemen, the very maximum punishment on that of twenty years--twenty years. Those seats are hard, ladies and gentlemen, but ladies and gentlemen, that coffin is hard. Thank you.

(At this point, Denver Looper, Bailiff was administered the oath.)

THE COURT: Ladies and gentlemen, you may now retire. Mrs. Looper will bring you the instructions and the four forms of verdict and as soon as you want to go for lunch, tell Mrs.

king or the state. We placed the responsibility on the state before a decision of death was made, to prove it, that it would be done in an orderly fashion, without vengeance, without anger, but that it be a vengeance, or retribution for the entire society, not for one person, not for one family, but for society because it was a crime against one of us, one human being, is a crime against the entire community. The murder, the deliberate killing of one of the members of this community, one of the members of this county, is a crime against, and a threat to every other member of that community, county and state, and unless it is punished, unless it is carried out, then we have no government, then we have no law, then we have chaos and anarchy. It must be done from this courtroom in a lawful manner, or no one is safe. The average person can take a hundred locks and put on their doors, have all of their guns and be prepared to fend off any attack, anybody that wants to come in, any strong man that wants to take over, anybody that wants to take over can do it, unless the law works, and the law works here. It works with twelve people. Everyone recognizes that the death penalty does not bring anybody back. Everybody recognizes that the death penalty has affects. It has the same affect on this defendant as it has on any person that is assessed the death penalty. They have families too, no matter how mean they are, no matter who they are, it has affects. Ladies and gentlemen, the law means for it to have an affect.

The community that established the punishment, whether it's imprisonment or the death penalty, needs for it to have an effect on a wide range, on a very wide range, as vengeance for th family that is specifically hurt, vengeance for the community to set an example to draw a line as to where human conduct will no longer be tolerated, that's it, that's enough, it will not be tolerated, you may not create this risk to human society, you may not create this risk to the people of this community. Ladies and gentlemen, Mr. Sleeper said the defendant is twenty-eight years old, talked about hardened people. How much harder, cooler, calmer can an individual get than to take a gun and go to an acquaintance's home, kill them when they answer the door and try to kill another one. How much colder and harder can a human being get, to go in there with the intention of taking a human life, before you ever get there, thinking about it, to plan it out, to walk up there and do it. You can't, ladies and gentlemen. There's no harder you can get. There's no--no way a human mind can get any harder than that: no remorse, nothing. What you want, what you have, I want, I'll take your life, take your life to get it, and do it--and do it, ladies and gentlemen, and there's no remorse at all. That's why I submit to you, ladies and gentlemen, the death penalty is cried out for in this case. Ladies and gentlemen, you as a jury do not inflict death on anybody. You, as a jury, do not put anybody in the penitentiary. The law of this state does that.

You make the decision of facts, as citizens with responsibilities. That's neither your right or your duty or your obligation or your responsibility. You as a jury, as an individual, do not kill anybody. You recommend the death penalty because of the coldness and the deliberateness with which the action is taken We agreed bias, sympathy, prejudice has no place in this court room. It has no place during the first stage and it has no place during this second stage. I submit to you, ladies and gentlemen, you will not bring Mrs. Stubbs back if you condemn this man to death, but I submit to you, ladies and gentlemen, that you will make this world a safer place for people to live, because that coolness and calmness and collectiveness and deliberateness with which all of these actions took place deserve it. Think of the plan he had developed. Think of the coldness to walk up to somebody that you know and put a bullet in their head. Think of the coolness and the calmness to shoot five shots at somebody that you know and think of the coolness a the calmness to set in here and look them in the face and show no remorse. I submit to you, ladies and gentlemen, that death is demanded; death is demanded. I ask you to take those forms and the one that says we find the aggravating circumstance exists, block out that block and decide that we find that this man deliberately created a risk of death to more than one person, and I ask you to sign the verdict form that says, we find the defendant guilty of murder in the first degree and

IN THE DISTRICT COURT OF THE TWENTIETH JUDICIAL DISTRICT

ARDMORE, CARTER COUNTY, OKLAHOMA

COPY

FILED
IN COURT OF CRIMINAL APPEALS
OKLAHOMA CITY, OKLAHOMA
MAR 13 1986
JAMES W. PATTERSON
CLERK

STATE OF OKLAHOMA,)
)
Plaintiff)
)
vs) NO. CRF-83-127
)
ROBERT ALLEN BRECHEEN,)
)
Defendant)

F 33 710

FILED
DISTRICT COURT

(TRANSCRIPT OF HEARING)
( )
(FEBRUARY 20, 1986)

B E F O R E :

Honorable Woodrow George

District Judge

A P P E A R A N C E S :

Fred Collins, District Attorney
Appearing for the State of Oklahom

Michael D. Clark and James
English of Clark Law Offices, Inc.
Appearing for the Defendant

OPPOSITION BRIEF

ORIGINAL

No. 86-7002

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

ROBERT ALLEN BRECHEEN

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA

ROBERT A. NANCE*
ASSISTANT ATTORNEY GENERAL

SANDRA D. HOWARD
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ATTORNEYS FOR RESPONDENT

July, 1987

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QUESTIONS PRESENTED

1. Whether the defendant in a homicide case must demonstrate that a fair trial is not possible as required by the court below, or whether the defendant is entitled to a change of venue based on the presumption that the jury was biased by outside factors.

2. Whether in a homicide case where the death penalty is sought, improper appeals by the prosecutor in the second stage constitute fundamental error.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

ROBERT ALLEN BRECHEEN,

Petitioner

vs.

STATE OF OKLAHOMA,

Respondent.

RESPONSE TO MOTION FOR WRIT OF CERTIORARI

The Respondent by and through Robert H. Henry, Attorney General of the State of Oklahoma, respectfully requests that this Court deny issuance of a Writ of Certiorari to review the decision of the Oklahoma Court of Criminal Appeals entered in this case on January 27, 1983.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals is reported at 732 P.2d 889 (Okla. Crim. App. 1987) and is set forth as Petitioner's Appendix A. On March 2, 1987 the Oklahoma Court of Criminal Appeals denied a petition for reconsideration which is included as Appendix B.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth, Seventh, Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari arising from a final judgment of the Oklahoma Court of Criminal Appeals affirming the conviction of Petitioner for the crime of First Degree Murder in violation of 21 O.S. 1981, §701.7 and Burglary in the First Degree in violation of 21 O.S. 1981 §1431 in the District Court of Carter County, Oklahoma. Punishment was assessed as a death sentence for the homicide and twenty years' imprisonment for the burglary. The trial court sentenced Petitioner in accordance with the jury's verdict.

STATEMENT OF THE FACTS

On March 27, 1983, Hilton Stubbs was awakened by the scream of his wife, Marie Stubbs (Tr. 234). He immediately heard a gunshot and saw his wife fall to the floor from the front door (Tr. 234). He reached for his gun and rolled from his bed to the floor. Petitioner came to the bedroom door and fired three shots into the empty bed. As Petitioner turned to leave, Mr. Stubbs fired at him (Tr. 234). Petitioner reached the porch and fired two more shots through the storm door at Mr. Stubbs. Mr. Stubbs fired again and saw Petitioner exit the front gate and walk north (Tr. 234-236).

Although Mr. Stubbs was unable to identify Petitioner, he described him as wearing a light colored shirt or jacket (Tr. 237). When the police arrived, they found Petitioner severely wounded lying by his truck approximatley two hundred yards north of the Stubbs' residence (Tr. 357).

Petitioner claimed that a man had entered his truck as he left a bar (Tr. 486). This man forced him to go to the Stubbs' residence and carry the rifle to the door. When Mrs. Stubbs opened the door, the man pushed Petitioner inside and the gun accidentally went off and killed Mrs. Stubbs (Tr. 491-492). Mr. Stubbs, however, testified tht he never saw more than one person in his house on the night of the murder (Tr. 271).

REASONS FOR DENYING WRIT

I. THE STANDARD FOR DETERMINING REQUEST FOR CHANGE OF VENUE HAS BEEN ANNOUNCED BY THIS COURT AND CONTINUES TO BE APPLIED CONSISTENTLY.

A. Standards employed by the United States Supreme Court

The theory of the law is that a juror who has formed an opinion cannot be impartial. "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." Irvin v. Dowd, 366 U.S. 717, 722 (1961).

A juror is presumed to be impartial and it is sufficient if the juror can lay aside his impression or opinion and render an opinion based on the evidence presented at trial. Id. at 723. It would be an impossible standard to hold that the mere existence of a preconceived notion as to guilt or innocence is sufficient to rebut the presumption of a prospective juror's impartiality. Rideau v. Louisiana, 373 U.S. 723, 730 (1963). At the same time, the individual juror's assurance that he is able to set aside his opinion and render a verdict based on the evidence cannot be dispositive of the accused's rights. The burden remains on the defendant to demonstrate the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality. Murphy v. Florida, 421 U.S. 794, 800 (1975); Irvin, 366 U.S. at 723.

While it is true that in most cases involving claims of due process deprivation a showing of identifiable prejudice is required, there may be situations in which the extent of adverse pretrial publicity is so great that this burden need

not be undertaken. Estes v. Texas, 381 U.S. 532, 542-43 (1965). The totality of the circumstances may warrant the conclusion that the procedures employed by the State are inherently lacking in due process. Sheppard v. Maxwell, 384 U.S. 333, 352 (1966). However, juror exposure to information about a defendant's prior convictions or to news accounts of the crime with which he is charged do not alone presumptively deprive the defendant of due process. Murphy, 721 U.S. at 799.

As stated in United States v. Wood, 299 U.S. 123, "[i]mpartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." Although a state may not substitute trial by ordeal, it is free to regulate the procedure of its courts in accordance with its own conceptions of policy. Rideau, 373 U.S. at 726; Brown v. Mississippi, 297 U.S. 278, 285 (1936).

B. The Issues Present in this Case Have Been Addressed by this Court's Prior Decisions

Petitioner asserts that the present case raises significant constitutional issues not addressed by this Court in prior decisions. First, Petitioner contends that the issue of whether the totality of circumstances surrounding the impartiality of prospective jurors may be such that there should be a presumption of impartiality has not been decided by this Court. The State submits that this questions has been dealt with in previous decisions of this Court.

In Sheppard, 384 U.S. at 351, this Court recognized that there may be situations in which procedures employed by the State involve such a probability that prejudice will result that the procedure is deemed inherently lacking in due process.

In Rideau, 373 U.S. at 726, the defendant's burden of showing actual prejudice was extinguished when television had exposed the community "repeatedly and in depth to the spectacle of [the accused] personally confessing in detail to the crimes with which he was later be be charged." In Turner v. Louisiana, 379 U.S. 476 (1965), the courtroom proceedings were deemed a "hollow formality" when two key witnesses were deputy sheriffs who doubled as jury shepherds during the trial. Even though the deputies swore they had not talked to the jurors about the case, this Court held that "it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for prosecution". Id. at 473.

Again, in Estes v. Texas, 381 U.S. 532 (1965), this Court viewed the totality of the circumstances and determined that prejudice resulted where there had been a bombardment of the community from both radio and television of a two-day hearing during which the original jury panel, the petitioner, the lawyers and the judge were highly publicized. When the new jury was empaneled at the trial, four of the jurors selected had seen and heard all or part of the broadcasts of the earlier proceedings.

The actual facts of Sheppard reveal that the trial judge failed to insulate the proceedings from prejudicial publicity and disruptive influences resulting in a carnival-like atmosphere. Reporters were seated inside the bar and interfered with the privacy of the trial participants, jurors were permitted to make phone calls during their deliberations at the end of the trial, the media disclosed prospective witnesses' testimonies and the trial court made no effort to control the release of leads, information and gossip to the press by witnesses and attorneys. This Court held that these procedures involved such a probability of prejudice that despite the absence of a showing of identifiable prejudice, the totality of the circumstances warranted this Court's conclusion that the accused was deprived of due process.

Therefore, it is clear that, in cases of extreme adverse publicity in the community at large or in the courtroom itself, the totality of circumstances surrounding prospective jurors may give rise to a presumption of partiality. The cases decided by this Court indicate a broad range of factors to be considered within the totality of the circumstances including publicity, courtroom decorum and notoriety. Analyzed in light of previous Supreme Court decisions, the facts of the present case simply do not rise to the level of creating a presumption of partiality.

Secondly, there is no authority that an accused is entitled to a change of venue based upon a "well grounded fear" of partiality. If no presumption of partiality exists, the record will be reviewed to determine whether the accused received a fundamentally fair trial. This review will focus on the voir dire of the individual jurors, voir dire statistics and the community atmosphere as reflected in the news media. Murphy, 421 U.S. at 800-803.

Prior Supreme Court decisions have clearly set forth the considerations to be taken into account when deciding whether venue should be changed. It is not now necessary for this Court to reconsider this issue.

II. THE STANDARD USED BY THE OKLAHOMA COURT IS CONSISTENT WITH DECISIONS OF THIS COURT.

The Oklahoma Court recognizes that there are cases in which prejudice will be presumed. This is limited to those circumstances in which the fact pattern reveals "the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings." Murphy, 421 U.S. at 799. See, Walker v. State, 723 P.2d 273, 278 (Okl.Cr. 1986). If the facts are not sufficiently egregious to give rise to the presumption, the Court must turn to any indications in the circumstances determine whether the defendant received a fundamentally fair trial. Murphy, 421 U.S. at 799.

In the present case, the Oklahoma Court found the voir dire was an adequate safeguard of the jury process and that the need for a change of venue was not established. The voir dire indicated no hostility to petitioner by the jurors as to suggest a partiality that could not be set aside. See, Murphy, 421 U.S. at 800. In looking beyond the possibility of a presumption of partiality, the Oklahoma court stated that the fact that jurors knew the victim did not demonstrate the need for a change of venue just as the mere existence of pretrial publicity was not sufficient to create the presumption. The Oklahoma Court went on to view the "totality of circumstances" concentrating on the exhaustive voir dire conducted at trial.

This analysis is clearly in line with that established by prior Supreme Court decisions. The Constitution lays down no particular tests and the Oklahoma Court afforded Petitioner due process of law.

Furthermore, the finding at a trial court upon this issue should not be set aside by a reviewing court unless the error is manifest. Patton, 467 U.S. at 1030; Irvin, 366 U.S. at 723.

III. THE STANDARD USED BY THE OKLAHOMA COURT PURPORTS WITH CONSTITUTIONAL REQUIREMENTS AND STATES ARE NOT BOUND BY A RIGID TEST OR PROCEDURE SO LONG AS DUE PROCESS IS NOT VIOLATED.

Just as states are free to adopt their own regulations involving numerous other constitutional issues, "[t]here are many ways to try to assure the kind of impartial jury that the Fourteeneth Amendment guarantees". Groppi v. Wisconsin, 400 U.S. 505, 509 (1971). The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . ." The Oklahoma court assures criminal defendant's this important right.

Even though states may chose to adopt various standards for determining juror partiality, their aim remains the same--to afford criminal defendants the right to an impartial jury.

Petitioner received a fair trial. An extensive voir dire was conducted and those who served on the jury stated that they could fairly and impartially judge the case. That is all that is constitutionally required. Irvin, 366 U.S. at 723. All those who served on his jury were fair and impartial negating an inference of actual prejudice and the setting of the trial did not rise to the level of creating a presumption of partiality, petitioner's trial was not considered a "hostile formality" and the need for a change of venue was not established.

IV. THIS COURT HAS RESOLVED THE ISSUE OF WHETHER IMPROPER APPEALS BY PROSECUTORS CAN PREVENT THE IMPOSITION OF THE DEATH PENALTY AND RECONSIDERATION IS NOT NECESSARY.

Recently, in Darden v. Wainwright, 477 U.S. ___, 106 S.Ct. 2404 (1986), this Court evaluated a claim that the prosecution's closing argument during the guilt phase of a bifurcated trial resulting in a death sentence rendered the trial fundamentally unfair. This Court held that the relevant question is whether the comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process". Darden, 106 S.Ct. at 2472 ___ citing Donnelly v. DeChristoforo, 416 U.S. 637.

This court in Darden agreed with the lower court that the comments of the prosecutor did not deprive petitioner of a fair trial. The comments included several offensive comments reflecting an emotional reaction to the case, implied that the death penalty would be the only guarantee against a future similar act and incorporated the defendant's use of the word "animal". Darden, 106 S.Ct. at 2471. However, it was not enough that the prosecutors' remarks were undesirable or even universally condemned. Darden, 106 S.Ct. at 2472.

As in the instant case, the weight of the evidence against petitioner was heavy. The prosecutor did not misstate the evidence or implicate any specific rights of the accused such as right to counsel or right to remain silent. In Darden, the overwhelming eyewitness and circumstantial evidence to support a finding of guilt reduced the likelihood that the jury's decision was influenced by argument.

The same is true in the present case. Although some of the comments may have been improper, they did not so infect the trial such that due process was violated. This Court has previously considered this issue and determined thatthe weight of the evidence may very well be evaluated in determining whether trials are fundamentally fair. Darden, 106 S.Ct. at 2473. It is, therefore, not necessary for this Court to accept certiorari to resolve this question.

CONCLUSION

The United States Constitution provides that a criminal defendant is entitled to an impartial jury. The Constitution lays down no particular tests or procedure in protecting this fundamental right. A state is free to regulate the procedure of its courts in accordance with its own conceptions of policy. The Oklahoma courts have protected petitioner's right to due process and he has not established that a change of venue was required. For the reasons stated above, Respondent respectfully request for a writ of certiorari be denied.

Respectfully submitted,

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REPLY BRIEF

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ORIGINAL

No. 86-7002

IN THE SUPREME COURT
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ROBERT ALLEN BRECHEEN,

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vs.

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Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION
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Petitioner Robert Brecheen submits this reply brief in response to the State of Oklahoma's opposition to the issuance of a writ of certiorari.

I. RESPONSE TO THE RESPONDENT'S STATEMENT OF THE FACTS.

Petitioner believes it is material to note that the respondent's opposition does not contest or even deal with the statement of facts concerning the trial proceedings presented by the petitioner.

Those facts must be presumed by the Court to be essentially correct and can be summarized as follows: petitioner was tried in a small town, before a jury of friends of the victim; the victim was the owner of a prominent store in the town; all jurors had read and heard about the case; the first six jurors admitted in front of all of the veniremen they had a fixed opinion as to guilt that could not be set aside and were then excused; the foreman of the jury had a pre-conceived notion as to guilt; almost all jurors knew members of the victims family;

many knew the prosecutor or prosecution witnesses; and the defendant was known to no one.

Those are the only facts of the trial proceedings relevant to the fair trial issue presented in the petition.

II. THE OPPOSITION DOES NOT INVALIDATE AND IN MANY CASES EVEN ADDRESS THE COMPELLING REASONS PRESENTED IN THE PETITION FOR GRANTING THE WRIT.

Petitioner submits that the opposition has not demonstrated that the issues raised in the petition should not be resolved by this Court.

First, the opposition fails to even address that part of the petition which points out that state courts of last resort have decided the federal constitutional issues raised by the "venue question" differently. In the context of a death penalty proceeding, that conflict rises to a level of national significance which is proper for resolution by this court.

Second, a careful reading of this court's prior decisions demonstrates that the important constitutional questions raised by the petition have not been resolved. Again, the resolution of this issue will have significance not only to petitioner but also to many future and pending death penalty cases where similar venue issues no doubt routinely arise.

A. The Opposition Fails to Address the Conflicts in State Courts of Last Resort on the Federal Constitutional Question.

As pointed out in the petition, the Oklahoma Court of Appeals in upholding the denial of petitio ers motion for a change of venue at his trial, did so based upon an interpretation that the federal constitution requires a change of venue only when a criminal defendant establishes by "clear and convincing evidence that a fair trial is a virtual impossibility." (App. A2)

That standard is in direct conflict with the standard used by other state courts of last resort. Other state courts have interpreted this Court's decisions and the federal constitution

to require a change of venue where there is a "reasonable likelihood" of an inability to obtain a fair trial. See e.g. Langham v. State, 491 So.2d 910 (Ala. Cr. App. 1986); State v. Brier, 263 N.W.2d 622, 626 (Sup. Ct. Minn. 1978); State v. Cuevas, 288 N.W.2d 525 (Iowa 1980); People v. Gendron, 243 N.E.2d 208 (1968) cert. denied 396 U.S. 889 (Ill. 1969); Com v. Cohen, 413 A.2d 1066 (Pa. 1980); Martinez v. Superior Court of Placer County, 629 P.2d 502 (Cal. Sup. Ct. 1981); Maine v. Superior Court, 438 P.2d 372 (Cal. Sup. Ct. 1968).

Indeed, the California Supreme Court, if presented with the motion made by petitioner at the trial level to an Oklahoma Court, would have decided the issue based upon the standard urged by the petitioner, namely whether the totality of circumstances bearing on the probability of obtaining an impartial trial suggests that there is a "reasonable likelihood" a fair trial cannot be obtained. Martinez v. Superior Court of Placer County, 629 P.2d 502 (Cal. Sup. Ct. 1981). In Martinez the court reviewed the following factors to determine whether such a likelihood existed: (1) the extent and kind of publicity; (2) the size of the community where the crime occurred; (3) the nature of the crime; and (4) the standing of the victim and the accused in the community.

None of these factors were considered by the Oklahoma Court. There is clearly a total conflict in the standard and approach used by these state courts in interpreting the guarantee of the sixth amendment.

The opposition does not directly address this conflict other than an oblique and misleading assertion that states can adopt their own standard for determining how to guarantee the sixth amendment right to a fair trial. (Opposition Brief at page 7.) This is a novel proposition, namely that states are free to adopt different "standards" for guaranteeing a federal constitutional right. This proposition suggests that states are even free to adopt standards different from those established by

this Court in interpreting federal constitution, indeed as the Oklahoma Court has done in this case. This is obviously not the law.

Respondent's argument, when put in the factual context of this case, further evidences why this Court should take this case. Oklahoma interprets the federal constitution to permit a person to be condemned to death after he has been tried in front of a group of potential jurors who had: read extensive publicity, formed opinions as to guilt, had known the victim or members of her family, knew the prosecutor and testifying officers, and did not know the victim. Further, Oklahoma would interpret the constitution to permit the actual jury to have the following characteristics: one person who knew the victim, one who knew the victim's daughter, three who knew the victim's husband, all jurors were customers of the victim's family store, three jurors who knew the prosecuting attorney, three who knew police witnesses, a foreman who had formed an opinion as to guilt and none of whom knew the petitioner. Under these circumstances, petitioner would have been granted a change of venue in other state courts but not in Oklahoma. This disparity cries out for the need for resolution by this Court.

B. The Opposition Incorrectly Suggests That This Court's Prior Decisions Have Resolved the Sixth Amendment Issue Raised by Petitioner.

The opposition suggests that this Court's prior decisions in Rideau v. Louisiana, 373 U.S. 723 (1963); Estes v. Texas, 381 U.S. 532 (1965); Murphy v. Florida, 421 U.S. 794 (1975); and Sheppard v. Maxwell, 384 U.S. 333 (1966), resolve the issue presented by petitioner.

Petitioner maintains that these decisions have focused on the circumstances in which pretrial publicity can so taint a proceeding as to mandate a change of venue. Indeed, the opposition concedes that those cases focus on the effect of adverse publicity. (Opposition Brief at p. 6). Further, the opposition concedes that the Court's prior decisions hold that

pretrial publicity can "give rise to a presumption of partiality". (p. 6)

The facts of this case however, suggest that a presumption of impartiality should be determined after consideration of circumstances beyond the pretrial publicity considered in the Court's prior decisions, including: (1) the size of the community; (2) the prominence of the victim; (3) the type of pretrial publicity and its likely impact based on the size of the community; (4) the jurors familiarity with witnesses and prosecuting attorneys; (5) the defendant's prominence or lack thereof; (6) the racial composition of jurors, victim and defendant; (7) the possibility that voir dire is ineffective or is conducted in a procedure which taints the responses of other jurors; and other factors which may bear on this issue.

These factors and whether an accused is entitled to a presumption of impartiality in these circumstances have not been addressed by this Court. The State admits as much when it states there is "no authority" for petitioners interpretation of the constitution. (Opposition p. 6). Absent such authority, there is a clear need for a decision by this Court, as demonstrated by the circumstances of this case.

Petitioner believes that Oklahoma, as well as other courts, have interpreted the Court's prior decisions to hold that the constitution requires a focus solely on the results of voir dire. This cannot be the case and the circumstances presented here demonstrate why. Petitioner was subjected to trial before a "hometown audience" in circumstances no reasonable person would assert gave even minimal assurance of the right to a fair trial. Even football teams avoid the impact of hometown favoritism by holding the Super Bowl in a neutral site. This is not a game but a fight for survival. This Court should resolve the issues raised by petitioner.

CONCLUSION

Before any person is put to death, society and this Court must insist that the condemned individual have a fair trial before an impartial jury. Oklahoma did not afford petitioner such an opportunity. Other states would. Petitioner believes this Court would also do so, but the issue has not been fully addressed. The Oklahoma Court needs the guidance of this Court to make the application of the federal constitution consistent throughout the land and consistent with the decisions of this Court and the intent of the United States Constitution.

Respectfully submitted,

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Dated: July 28, 1987

NO. 86 - 7002

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CERTIFICATE OF SERVICE

I, Steve W. Berman, a member of the Bar of this Court, do hereby certify that I have this day served a copy of this Reply Brief in Support of Petition for Writ of Certiorari upon counsel for the State of Oklahoma, by depositing same with the United States mail, with adequate first class postage, addressed to Ms. Jean M. LeBlanc, Assistant Attorney General, 112 State Capitol Building, Oklahoma City, Oklahoma 73105, this 28th day of July, 1987.

Steve W. Berman

SUPPLEMENTAL BRIEF

ORIGINAL

No. 86-7002

IN THE

Supreme Court of the United States

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SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner filed a petition for a writ of certiorari on June 2, 1987. A reply to the opposition in support of the petition was filed on July 28, 1987. The petition is still pending before this court. Petitioner now files this supplemental memorandum, pursuant to Supreme Court Rule 22.6, to bring to the Court's attention recently reported decisions which bear on the questions presented by the petition.

1. RECENT STATE COURT DECISIONS AFFIRM THE EXISTENCE OF A CONFLICT CONCERNING THE SIXTH AMENDMENT QUESTION PRESENTED BY PETITIONER.

As previously presented to the Court, the Oklahoma Court of Appeals in upholding the trial court's denial of petitioner's motion for a change of venue interpreted the federal constitution to require a change of venue only when a criminal defendant establishes by "clear and convincing evidence that a fair trial is a virtual impossibility." (App A2)

As also previously mentioned, that standard is in direct conflict with the standard used by other state courts of last resort interpreting the federal constitution and this court's decisions, to require a change of venue where there is a "reasonable likelihood" of an inability to obtain a fair trial." See e.g., Langham v. State, 491 So.2d 910 (Ala. Cr. App. 1986); State v. Brier, 283 N.W.2d 622, 626 (Sup. Ct. Minn. 1978); State v. Cuevas, 288 N.W. 2d 525 (Iowa 1980); People v. Gendron, 243 N.E.2d 208 (1968) cert. denied 396 U.S. 889 (Ill. 1969); Com v. Cohen, 413 A.2d 1066 (Pa. 1980); Martinez v. Superior Court of Placer County, 629 P. 2d 502 (Cal. 1981); People v. Balderas, 711 P.2d 480 (Cal. 1985); Maine v. Superior Court, 438 P.2d 372 (Cal. 1968).

Recent decisions of state courts of last resort confirm that there is a conflict in determining the appropriate standard for determining when a change of venue is required to effectuate the sixth amendment guarantee of a fair trial. For example, in contrast to the Oklahoma Court's "virtual impossibility standard", the standard recently used by the Montana Supreme Court is whether there are "reasonable grounds to believe that the prejudice actually exists and that by reason of the prejudice there is a reasonable apprehension that the accused cannot receive a fair and impartial trial." State v. Pease, 740 P.2d 659, 664 (Mont. 1987). Cf, State v. Hunter, 740 P. 2d 559, 565 (Kan. 1987).

The recently reported decision in State v. Moore, 356 SE.2d 336 (N.C. 1987), is dramatic additional confirmation of this conflict among the state courts. In Moore, the defendant had presented the trial court with affidavits of ten citizens which indicated they had read pretrial publicity about the case and did not believe the defendant could get a fair trial. Newspaper accounts of the crime mentioning the defendant were also admitted. In response the prosecution presented witnesses who

had been exposed to publicity but who indicated they could render an impartial verdict. Of the actual jurors, ten had heard of the case, six knew one of the state's witnesses, ten knew the sheriff and all who knew the victim were excused. Facts indicating a potential for prejudice not nearly as egregious as those that existed in this case.

The trial court denied the motion for a change of venue on the grounds that the defendant has the burden of proving by a preponderance of the evidence that there is a "virtual impossibility" or at least that "it would be highly unlikely" that the accused would receive a fair trial. A standard almost identical to the one used by the Oklahoma Court.

The North Carolina Supreme Court reversed, holding that the proper test is whether it is "reasonably likely" that prejudice exists which would make a fair trial unlikely.

Thus, had petitioner been tried in North Carolina, California or Montana, there is little doubt that his sixth amendment right to a fair trial would have resulted in his request for a change of venue being granted. But Cf., State v. Jenkins, 508 So.2d 191 (La. App.3 Cr. 1987) (virtual impossibility standard); State v. Hunter, 740 P. 2d 559, 565 (Kan. 1987) (using a confusing standard somewhere in the middle between California, North Carolina, Montana and Oklahoma.)

These decisions further evidence the conflict that exists in the state courts of last resort in interpreting how and when to effectuate the sixth amendment right to a fair trial. Given the context of this disparity arising in a death case, the need for resolution is all the more pressing - petitioner was sentenced to death in front of a jury he would never have faced in other states.

II. THESE RECENT STATE COURT DECISIONS AFFIRM THE NEED FOR THIS COURT TO RESOLVE THE SIXTH AMENDMENT ISSUES RAISED BY PETITIONER

Petitioner has argued to this Court, without credible opposition, that this Court's prior decisions in this area have focused exclusively on when pretrial publicity can so taint a proceeding to mandate a change of venue. Petitioner has argued that this court should decide whether a presumption of impartiality should be determined after an examination of the totality of circumstances potentially bearing on the right to a fair trial, not just pretrial publicity. Those factors include:

(1) The size of the community; (2) the prominence of the victim; (3) the type of pretrial publicity and its likely impact based on the size of the community; (4) the jurors familiarity with witnesses and prosecuting attorneys; (5) the defendant's prominence or lack thereof; (6) the racial composition of jurors, victim and defendant; (7) the possibility that voir dire is ineffective or is conducted in a procedure which taints the responses of other jurors; (8) whether the death penalty is being sought, and other factors which may bear on this issue.

This is the approach followed by some state courts. See, e.g. People v. Balderas, 711 P.2d 480, 496-499 Cal. (1985).

Recent state court decisions confirm the need for guidance from this Court in this important constitutional area. Some of the state courts appear to consider some of these factors. See e.g., State v. Hunter, 740 P.2d 559 (Kan. 1987) (size of community and knowledge of victim or trial participants should be considered). Some courts additionally view the fact that the death penalty is sought as having a bearing on the venue decision. State v. Halsey, 526 A.2d 1165 (N.J. Super L. 1987).

These decisions, when combined with the cases discussed in previous pleadings, add to the substantial disparity among the state courts of last resort concerning the factors to be

considered in determining when the accused is entitled to a change of venue. This disparity exists in part because the question has not been resolved by this Court. This disparity can and should be resolved by the Court's granting of the petition.

CONCLUSION

For the reasons set forth in this supplemental memorandum and in other filings with this Court, Petitioner respectfully submits the petition should be granted to resolve a conflict in the state courts and to decide a previously undecided constitutional question of overriding importance to the constitutional administration of justice.

Respectfully submitted,

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Dated: October 30, 1987

NO. 86 - 7002

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1987

ROBERT ALLEN BRECHEEN,

Petitioner

vs.

STATE OF OKLAHOMA,

Respondent.

CERTIFICATE OF SERVICE

I, Steve W. Berman, a member of the Bar of this Court, do hereby certify that I have this day served a copy of this Supplemental Memorandum in Support of Petition for Writ of Certiorari upon counsel for the State of Oklahoma, by depositing same with the United States mail, with adequate first class postage, addressed to Ms. Jean M. LeBlanc, Assistant Attorney General, 112 State Capitol Building, Oklahoma City, Oklahoma 73105, this 30th day of October, 1987.

Steve W. Berman

SUPPLEMENTAL BRIEF

ORIGINAL

No. 86-7002

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1987

ROBERT ALLEN BRECHEEN,

Petitioner

vs.

STATE OF OKLAHOMA,

Respondent.

PETITIONER'S SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT
OF THE UNITED STATES

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ROBERT ALLEN BRECHEEN,

Petitioner

vs.

STATE OF OKLAHOMA,

Respondent.

PETITIONER'S SECOND SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI

Petitioner filed a petition for a writ of certiorari on June 2, 1987. A reply to the opposition in support of the petition was filed on July 28, 1987. The petition is still pending before this court. Petitioner filed a supplemental memorandum on October 30, 1987. Petitioner now files this second supplemental memorandum, pursuant to Supreme Court Rule 22.6, to bring to the Court's attention two recently reported State Court decisions which further support review of the questions presented by the petition for certiorari.

I. RECENT STATE COURT DECISIONS AFFIRM THE EXISTENCE OF A CONFLICT CONCERNING THE SIXTH AMENDMENT QUESTION PRESENTED BY PETITIONER.

The right to a trial before a truly impartial jury is a fundamental principle of our constitutional system of justice. The proper effectuation of that right in the context of a death penalty case can be the deciding factor in the ultimate determination under our criminal justice system, whether a defendant lives or dies.

As previously presented to the Court, the Oklahoma Court of Appeals in upholding the trial court's denial of petitioner's motion for a change of venue, interpreted the federal constitution to require a change of venue only when a defendant establishes by "clear and convincing evidence that a fair trial is a virtual impossibility." (Appendix)[1]

As also previously mentioned, the Oklahoma "clear and convincing" standard is in direct conflict with the standard used by other state courts of last resort in interpreting the sixth amendment of the federal constitution and this court's decisions concerning that guarantee. Those courts have consistently held that the sixth amendment requires a change of venue where there is a "reasonable likelihood" of an inability to obtain a fair trial." See e.g., State v. Pease, 740 P.2d 659, 664 (Mont. 1987); State v. Moore, 356 SE.2d 336 (N.C. 1987); Langham v. State, 491 So.2d 910 (Ala. Cr. App. 1986); People v. Balderas, 711 P.2d 480 (Cal. 1985); Martinez v. Superior Court of Placer County, 629 P. 2d 502 (Cal. 1981); State v. Cuevas, 238 N.W. 2d 525 (Iowa 1980); Cor v. Cohen, 413 A.2d 1066 (Pa. 1980); State v. Brier, 283 N.W.2d 622, 626 (Sup. Ct. Minn. 1978); People v. Gendron, 243 N.E.2d 208 (1968) cert. denied 396 U.S. 889 (Ill. 1969); Maine v. Superior Court, 438 P.2d 372 (Cal. 1968).

Two additional recent decisions of state courts of last resort confirm petitioner's contention that there is a conflict between the states in the standard utilized to effectuate the sixth amendment guarantee of a fair trial. In the recently reported case of Brown v. State, 743 P.2d 133 (Okl. Cr. 1987), the Oklahoma Court continued to use the standard used in petitioner's case, that "the defendant must show by clear and convincing evidence that he was prejudiced as a result of jurors being specifically exposed to adverse publicity." Id. at 136. In applying this test in Brown, the Oklahoma Court first found

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[1]Refers to the Appendix attached to the original petition for certiorari.

that the pretrial publicity was not so adverse as to warrant a presumption of prejudice. Id. at 136. The court then examined whether the "totality of circumstances" indicated the defendant did not receive a fundamentally fair trial. In doing so the court examined only the results of the trial judges voir dire and the public expression by jurors of impartiality. The court concluded by finding that the defendant had failed to show the trial setting was so pervasively influenced by the press as to render the setting inherently prejudicial. Id. at 137. In reaching this conclusion, the court did not review other factors, examined by other state courts in similar circumstances, such as the size of the community, the setting of the voir dire, the jurors familiarity with witnesses and victims, and a variety of other factors. See e.g., People v. Balderas, 711 P.2d 480 (Cal. 1985).

This recent decision demonstrates that the Oklahoma court continues to utilize a standard that conflicts with the "reasonable likelihood" standard adopted by other state courts.

The recent decision of the Washington Supreme Court in State v. Rupe, 743 p.2d 210 (Wash. 1987), adds to this conflict. The Rupe court utilized a standard similar to that in California, North Carolina, Montana, and other states, namely that to obtain a change of venue "the defendant only need show a probability of unfairness or prejudice." Id at 220. The Washington court adopted this standard in part from this court's decision in Sheppard v. Maxwell, 384 U.S. 333 (1966.)

Thus, had petitioner been tried in Washington, North Carolina, California or Montana, there is little doubt that his sixth amendment right to a fair trial would have been judged under a different standard than that used in Oklahoma, and there is a significant possibility that his request for a change of venue would have been granted. Cf. State v. Jenkins, 508 So.2d 191 (La. App.3 Cr. 1987) (virtual impossibility standard); State

v. Hunter, 740 P. 2d 559, 565 (Kan. 1987) (using a confusing standard somewhere in the middle between California, North Carolina, Montana and Oklahoma.) In a death penalty case, the moving of a trial site to a neutral site may be the difference between a death sentence and life.

This conflict also exists in the factors focused on in determining the right to a change of venue. In reviewing requests for a change of venue, the Oklahoma Court, in petitioner's case and in Brown v. State, supra, focused exclusively on the extent of publicity and the jurors' public expression of impartiality.

As previously noted, other courts in interpreting the sixth amendment guarantee of a fair trial, examine a variety of factors that go far beyond the narrow focus of the Oklahoma court. See e.g. People v. Balderas, 711 P.2d 480, 496-499 (Cal. 1985.) The approach of the Washington Court in Rupe utilized the broad range of factors consistently ignored by the Oklahoma Courts:

> This court has recognized other factors which aid the inquiry of whether the trial court abused its discretion in denying a motion for change of venue:
>
> (1) the inflammatory or noninflammatory nature of the publicity; (2) the degree to which the publicity was circulated throughout the community; (3) the length of time elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the difficulty encountered in the selection of the jury; (5) the familiarity of prospective or trial jurors with the publicity and the resultant effect upon them; (6) the challenges exercised by the defendant in selecting the jury, both preemptory and for cause; (7) the connection of government officials with the release of publicity; (8) the severity of the charge; and (9) the size of the area from which the venire is drawn.

Id. at 221.

These recent decisions further evidence the conflict that exists in the state courts of last resort, not only in what standard to use, but also in what factors to consider, in interpreting how and when to effectuate the sixth amendment right to a fair trial. Given the context of this disparity

arising in a death case, the need for resolution is all the more pressing - petitioner was sentenced to death in front of a hometown jury he would never have faced in other states.

CONCLUSION

Petitioner believes it bears repeating -- the right to a trial before a truly impartial jury is a fundamental principle of our system of justice. The proper effectuation of that right in the context of a death penalty case can literally be the deciding factor in the ultimate determination under our justice system, whether a defendant lives or dies. A clear conflict exists on the standard to be utilized in guaranteeing this fundamental constitutional right. Petitioner would have faced a truly impartial jury in other states.

For the reasons set forth in this second supplemental memorandum and in other filings with this Court, Petitioner respectfully submits the petition should be granted to resolve a conflict in the state courts concerning the right to a change of venue, and to decide a previously undecided constitutional question of overriding importance to the constitutional administration of justice.

Respectfully submitted,

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Dated: January 13, 1988

NO. 86 - 7002

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1987

ROBERT ALLEN BRECHEEN,
Petitioner

vs.

STATE OF OKLAHOMA,
Respondent.

CERTIFICATE OF SERVICE

I, Steve W. Berman, a member of the Bar of this Court, do hereby certify that I have this day served a copy of this Supplemental Memorandum in Support of Petition for Writ of Certiorari upon counsel for the State of Oklahoma, by depositing same with the United States mail, with adequate first class postage, addressed to Ms. Jean M. LeBlanc, Assistant Attorney General, 112 State Capitol Building, Oklahoma City, Oklahoma 73105, this 13th day of January, 1988.

Steve W. Berman

OPINION

SUPREME COURT OF THE UNITED STATES

ROBERT A. BRECHEEN *v.* OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. 86–7002. Decided February 29, 1988

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

This Court has insisted that an accused be tried by "a public tribunal free of prejudice, passion, excitement, and tyrannical power." *Chambers* v. *Florida*, 309 U. S. 227, 236–237 (1940). We have recognized that failure to ensure the impartiality of a jury "violates even the minimal standards of due process." *Irvin* v. *Dowd*, 366 U. S. 717, 722 (1961). The Oklahoma court's denial of petitioner's unopposed motion for change of venue raises serious doubts about whether those minimal standards were met in this case. These doubts demand that we undertake two separate inquiries. First, we must consider whether and to what extent our precedents regarding jury impartiality set constitutional limits on state change of venue standards. Second, we must address the proper application of those precedents to the unique setting of capital sentencings.

I

On March 23, 1983, Marie Stubbs, wife of Hilton Stubbs, a prominent storekeeper in Ardmore, Oklahoma, was shot and killed in her home. The murder and the subsequent arrest of petitioner Robert Brecheen were the subject of extensive local newspaper and television coverage. Ardmore, which has a population of approximately 25,000, is located in Carter County, which has a population of approximately 40,000. Petitioner's attorney filed a motion, accompanied by affidavits, for change of venue from Carter County. Although the

motion was unopposed, the trial judge refused to grant it after conducting voir dire. The jury that was finally impaneled contained one person who knew the victim, one who knew the victim's daughter, and three who knew the victim's husband. All but one of the jurors were customers at the Stubbs' family store. Three jurors knew the prosecuting attorney and three knew officers who would testify for the prosecution. All of the jurors had heard of the case through pretrial publicity. The jury convicted petitioner of burglary and homicide and sentenced him to death.

On appeal, petitioner challenged, *inter alia*, the trial court's refusal to grant him a change of venue. The Oklahoma Court of Criminal Appeals rejected petitioner's claim, holding that "[i]t is only when a criminal defendant establishes by clear and convincing evidence that a fair trial is a virtual impossibility that such a motion should be granted." App. to Pet. for Cert. A–2.

II

This Court has established that a refusal to grant a motion for change of venue may constitute a violation of due process. See *Groppi* v. *Wisconsin*, 400 U. S. 505 (1971); *Rideau* v. *Louisiana*, 373 U. S. 723 (1963); *Irvin* v. *Dowd*, *supra*. A defendant seeking to establish such a violation must demonstrate either that his trial resulted in "identifiable prejudice" or that it gave rise to a presumption of prejudice because it involved "such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes* v. *Texas*, 381 U. S. 532, 542–543 (1965). In deciding whether such a presumption of prejudice is warranted, courts must examine "any indications in the totality of circumstances that petitioner's trial was not fundamentally fair." *Murphy* v. *Florida*, 421 U. S. 794, 799 (1975).

We have had little occasion to apply these basic principles to determine whether particular state standards for change of venue comport with the requirements of due process.

Most of our precedents regarding due process and jury neutrality consist of careful examinations of the circumstances surrounding specific trials to determine whether they give rise to a presumption of prejudice. See, *e. g.*, *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966); *Turner* v. *Louisiana*, 379 U. S. 466 (1965). Although we did strike down one state venue statute which categorically denied change of venue for misdemeanors, see *Groppi* v. *Wisconsin*, *supra*, we have not considered any other wholesale restrictions on venue change.

In this vacuum of constitutional precedent, states have taken divergent paths. Most states have followed the well-trod course of granting motions for venue change when the totality of the circumstances establish "a reasonable likelihood that in the absence of such relief, a fair trial cannot be had." *Martinez* v. *Superior Court*, 29 Cal. 3d 574, 577–578, 629 P. 2d 502, 503 (1981) (quoting *Maine* v. *Superior Court*, 68 Cal. 2d 375, 383, 438 P. 2d 372, 377 (1968)). The *Martinez* Court defined "reasonable likelihood" as a lesser standard of proof than "more probable than not." *Martinez* v. *Superior Court*, *supra*, at 578, 629 P. 2d 503. See also *People* v. *Gendron*, 41 Ill. 2d 351, 243 N. E. 2d 208 (1968) (adopting "reasonable likelihood" standard), cert. denied, 396 U. S. 889 (1969); *State* v. *Cuevas*, 288 N. W. 2d 525 (Iowa 1980) (same); *State* v. *Beier*, 263 N. W. 2d 622 (Minn. 1978) (same). Other states have decided to grant change of venue motions when the circumstances establish a substantial likelihood of prejudice. See, *e. g.*, *Commonwealth* v. *Cohen*, 489 Pa. 167, 413 A. 2d 1066, cert. denied, 449 U. S. 840 (1980). The ABA has explicitly endorsed this latter approach in its Standards Relating to Fair Trial and Free Press, Standard 8–3.3(c) (2d ed. Approved Draft, 1978). Oklahoma, however, diverges sharply from its sister states in setting a much higher threshold for granting a change of venue motion, requiring "clear and convincing evidence" that a fair trial is a "virtual impossibility."

In my view, Oklahoma's strong presumption against venue change fails to accommodate properly the concerns expressed in our due process precedents. Those precedents implicitly acknowledge that the defendant's interest in a fundamentally fair trial outweighs the state's interest in holding that trial in a particular district. Oklahoma's standard is out of step with this Court's repeated recognition that "our system of law has always endeavored to prevent *even the probability* of unfairness." *In re Murchison*, 349 U. S. 133, 136 (1955) (emphasis added), quoted in *Sheppard* v. *Maxwell*, *supra*, at 352; *Estes* v. *Texas*, *supra*, at 543. We frequently have invoked the opinion of Chief Justice Taft fifty years ago, which held that "[e]very procedure which would offer a *possible* temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey* v. *Ohio*, 273 U. S. 510, 532 (1927) (emphasis added), cited in *Irvin* v. *Dowd*, *supra*, at 722; *Estes* v. *Texas*, *supra*, at 543. We should grant certiorari to establish clearly the minimal requirements of the due process clause for state change of venue standards.

III

Our prior precedents have left a second gap of perhaps even more importance. We have failed to give any guidance as to the circumstances that might give rise to a presumption of prejudice in the sentencing phase of a bifurcated capital trial. Our cases have dealt exclusively with factors that might influence the jury in its fact-finding function when it makes determinations of guilt or innocence. We held, for example, that the pretrial broadcast of a defendant in the act of confessing to the charged crime inherently prejudiced the jury's ability to evaluate objectively his guilt. See *Rideau* v. *Louisiana*, *supra*. Similarly, we held that when key government witnesses doubled as official guardians of the jury during deliberations, the ability of the jury to assess witness

credibility was presumptively prejudiced. See *Turner* v. *Louisiana*, *supra*. But the influences that might impair the truth-seeking function of the jury in guilt determinations are not identical to those that impinge on its responsibility to administer fairly the death penalty.

This case demonstrates that lack of congruence. The fact that many of the jurors knew the victim or members of the victim's family might not presumptively establish the fundamental unfairness of the guilt proceedings. There may be little reason to doubt the testimony of such jurors at voir dire that they could put aside their knowledge of the consequences of the crime in order to establish the facts of its commission. But the jury wears an altogether different hat when it sits as sentencer. It must make a moral decision whether a defendant already found guilty deserves to die for his crime. As we have previously recognized, the function of the sentencing jury is to "express the conscience of the community on the ultimate question of life or death." *Witherspoon* v. *Illinois*, 391 U. S. 510, 519 (1968). When a jury is composed, as this petitioner's was, of people who are personally familiar with the consequences of a defendant's crime, it cannot perform this function in an impartial manner. We held as much just last Term, when we declared that the Eighth Amendment forbids the introduction of a victim impact statement during the sentencing phase of a capital trial. We concluded that a description of the effects of the murder on the victim's family and friends was too likely to inflame the jury and lead to a sentence based on caprice or emotion rather than reason. See *Booth* v. *Maryland*, 482 U. S. —— (1987). Surely impaneling a jury with personal knowledge of these effects would have much the same result. The likelihood of such a result should give rise to a presumption of prejudice during the sentencing phase, just as extensive news coverage might establish that presumption in the guilt phase.

IV

This petition raises two important issues that call for this Court's review. We must establish what the due process clause requires of state legislatures and courts in formulating general standards for change of venue. Oklahoma's strong presumption against granting such motions raises serious concerns about the fundamental fairness of its criminal proceedings. In addition, we must recognize and rule on the difference between the guilt and penalty phases of a capital trial for the purpose of presuming prejudice when jury impartiality is called into question. This distinction is required not because death is a qualitatively different penalty from any other (although it is), but because the jury's function is profoundly altered when it sits as sentencer.